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No. 08-

In the Supreme Court of the United States

MARCUS A. BORDEN,
Petitioner,

v.

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK; BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK; and DR. JO ANN MAGISTRO, SUPERINTENDENT, SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Lee v. Weisman*, 505 U.S. 577, 599 (1992), this Court reserved for future decision the question of public school educators' Establishment Clause obligations when they interact with public school students who are exercising their constitutional right to engage in religious acts. In *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313 (2000), this Court confirmed the constitutional right of public school students to pray in public schools "at any time" but did not decide the corollary question of what public school educators are allowed and not allowed to do under the Establishment Clause when students engage in prayer in their presence. This petition squarely presents the question reserved in *Lee,* not addressed in *Santa Fe,* but of vital importance to public school educators in this country:

Do public school administrators, faculty, coaches and staff violate the Establishment Clause if they make secular gestures of silent respect in response to constitutionally protected student-initiated religious acts?

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PETITION FOR A WRIT OF CERTIORARI

Marcus A. Borden respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at *Borden v. School District of the Township of East Brunswick*, 523 F.3d 153 (3d Cir. 2008), and is reprinted as Appendix A, Pet. App. 1a–75a.

The court of appeals reversed the summary judgment order entered in petitioner's favor by the United States District Court for the District of New Jersey on July 25, 2006, reprinted as Appendix B, Pet. App. 76a–77a. That order incorporated oral findings of fact and conclusions of law made on the same date, which are reprinted as Appendix C, Pet. App. 78a–87a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Third Circuit entered its judgment and opinion on April 15, 2008, and denied petitioner's timely request for rehearing en banc on May 15, 2008. Justice Souter granted petitioner's applications to extend the time to file a petition for writ of certiorari, extending the deadline until October 10, 2008. Supreme Court Dkt. No. 07A1023. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law respecting an establishment of religion . . . .

STATEMENT OF THE CASE

A. Factual History

1. Petitioner Marcus A. Borden is a public school teacher and head football coach at East Brunswick High School ("EBHS") in East Brunswick, New Jersey, a position that he has held since 1983. He has received three national coaching awards, including recognition as the national high school football coach of the year. J.A. 437.[1] Respondents are the EBHS Board of Education, the EBHS School District, and the Superintendent of EBHS schools. J.A. 68.

For a number of years, Coach Borden and the EBHS football team engaged in two pre-game prayer traditions. Pet. App. 80a; J.A. 174–175. These traditions were started by Coach Borden's predecessor, sometime prior to 1983. Pet. App. 6a; J.A. 112–114. *First*, Borden joined in prayer before meals with his players, sometimes leading the prayer himself, at a pre-game private dinner in the

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[1] Unless otherwise noted, references to "J.A." are to the Joint Appendix filed before the court of appeals, and references to "R." are to docket entries before the district court.

school cafeteria. Pet. App. 6a; J.A. 110. *Second*, the players and coaches would "take a knee" together in the locker room immediately before each game. J.A. 106, 108, 441, 447–448. While taking a knee with his team, Borden would discuss tactics and strategies and rally his players for the game. Taking a knee is a part of football tradition in America. J.A. 108–109; 126–127. Following that discussion, Borden either joined in or led the team in prayer. J.A. 174–175.

2. In October 2005, Coach Borden stopped praying with his players at the direction of School District superintendent Jo Ann Magistro. J.A. 158–159. Borden then sought guidance as to what he could and could not do in response to the voluntary, student-initiated pre-game prayers. After neither Magistro nor the School District's counsel, Martin Pachman, could provide Borden with definitive guidance, respondents issued written guidelines that attempted to answer Borden's questions.

Respondents' guidelines stated that (i) students have "a constitutional right to engage in prayer on school property, at school events, and even during the course of the school day"; (ii) students could pray before a meal in the cafeteria and hold a "prayer huddle" before a game; (iii) school representatives, including coaches, could not "encourage, lead, initiate, mandate, or otherwise coerce, directly or indirectly, student prayer at any time"; and (iv) school representatives could not "participate in student-initiated prayer." Pet. App. 9a–10a. The word "participate" was not defined, nor was any distinction drawn between active and passive

participation. The guidelines also failed to address the concrete questions Coach Borden had previously asked, such as: if his team began to pray voluntarily, must he leave the room? J.A. 439. Could he stand when the players stood to pray, or must he remain seated? J.A. 439. Shortly after the School District issued the guidelines, the EBHS Board of Education issued a public statement supporting Superintendent Magistro and further stating that "[w]e respect the rights of any employee to disagree with policies, procedures and legal interpretations, but cannot and will not tolerate violations of these rules by any employee of the district." Pet. App. 11a.

In light of the unclear guidelines, Borden believed that he was obligated to distance himself completely from his team's two traditional pre-game prayer activities for the remainder of the 2005 season. At the team's pre-game dinners, to avoid any appearance of participation, he remained motionless while the students prayed. J.A. 440–441. During the pre-game locker room strategy discussion he continued to take a knee, but stood up and remained motionless once the players initiated prayer. J.A. 441–442. The captain of the 2006 team, who was a player on the 2005 team, said that watching Borden respond to the 2005 team's pre-game prayers, was "awkward to watch," and hurtful to "team morale and team spirit." J.A. 169.

B. Procedural History

1. In November 2005, Borden filed suit against respondents in the Superior Court of New Jersey.

Pet. App. 14a. He sought a declaratory judgment that the school district's guidelines and the Board's statement violated his rights under the free speech, due process, and equal protection provisions of the New Jersey Constitution and federal Constitution. Coach Borden did *not* seek to pray or join with his players in pre-game prayers. Rather, he sought only to engage in two silent, respectful gestures: (i) to bow his head when students pray at the pre-game dinner, and (ii) to continue to "take a knee" with the team when they conclude the pre-game locker room meeting with a player-led prayer. Pet. App. 15a.

After respondents removed the case to federal district court, respondents moved for summary judgment, asserting that Borden's gestures of silent respect, if permitted, would violate the Establishment Clause. R. 15 at 16. Borden cross-moved for summary judgment, advancing his affirmative claims while asserting that his silent gestures would not violate the Establishment Clause. R. 16. In reply, respondents conceded (i) that there were no material facts in issue, J.A. 27, and (ii) that if respondents' Establishment Clause defense were rejected, then Borden would be entitled to summary judgment on all of his affirmative constitutional claims:

> [I]f this Court were to find [Borden's] actions do not implicate the Establishment Clause, then regardless of what constitutional right Plaintiff seeks relief under . . . he would be entitled to participate in voluntary, non-disruptive student prayers.

R. 20 at 46.

In July 2006, the district court granted Borden's cross-motion and denied respondents' motion. Pet. App. 78a–87a. The court relied on (i) Borden's representation that he was not seeking to join with or lead his players in pre-game prayers, J.A. 5; (ii) respondents' concession that there were no material facts in issue, J.A. 27; and (iii) respondents' concession that Borden had the constitutional right to engage in his silent gestures as long as they did not violate the Establishment Clause, R. 20 at 46.

Applying this Court's "endorsement" test, the district court held that Borden's secular gestures would not violate the Establishment Clause. *First*, the district court found that bowing one's head and taking a knee in football are not religious acts and, thus, rejected the argument that a reasonable observer would view Borden's secular actions as an endorsement of religion. Pet. App. 84a. *Second*, the court rejected Respondents' coercion concerns, holding that Borden's silent signs of respect could not have any coercive effect on students. Pet. App. 85a. *Finally*, the district court underscored the lack of clarity in the school's "guidelines":

> [W]e come down to what is considered participation. What is the coach to do? Should he leave the room? Turn his back? Stand at attention and not move a muscle? I don't think so. May he clasp his hands? At what angle or degree is his head considered bowed? May he crouch down, bend a knee, take a knee, or completely kneel?

> I don't think it's fair to ask a coach to do nothing. I agree that an Establishment Clause violation would occur if the coach initiated and led the activity, but I find nothing wrong with remaining silent and bowing one's head and taking a knee as a sign of respect for his players' actions and traditions, nor do I believe would a reasonable observer.

Pet. App. 85a–86a. Having rejected respondents' Establishment Clause defense, the district court held, consistent with respondents' concession, that Borden's constitutional rights had been violated by the respondents' guidelines. Pet. App. 86a.

2. Respondents appealed to the Third Circuit.[2] Represented by new counsel, respondents reversed their legal positions and attempted to abandon their district court concession that Borden had valid constitutional rights to bow his head and take a knee. On appeal, respondents argued that Borden had no rights under the state and federal constitutions and, therefore, that it was not

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[2] Respondents made no efforts to stay the district court's declaratory judgment pending appeal. Shortly after the district court entered judgment against them, respondents stated that they were "pleased" by the decision. John P. Martin, *School Coach Can Kneel While Players Pray*, The Star Ledger (Newark, N.J.), July 26, 2006, at 1. Hence, during the 2006 and 2007 football seasons, Borden bowed his head in silent respect during player-led grace at pre-game meals, and remained on his knee at the conclusion of pre-game locker room meetings while his players voluntarily prayed.

necessary for the court of appeals to reach respondents' Establishment Clause affirmative defense, even though that was the only contested issue before the district court. Pet. C.A. Br. 30–32.

Judge Fisher's lead opinion allowed respondents, over Borden's objections, to retract their district court concessions and make new arguments challenging the validity of Borden's affirmative constitutional claims. Rather than remanding to the district court to address these new arguments, the lead opinion went on to decide the merits of Borden's affirmative constitutional claims in favor of respondents.

As to a number of Borden's affirmative constitutional claims, the court's holding was linked to and depended upon the interpretation of the Establishment Clause. Specifically, the court ruled that "the guidelines prohibiting [Borden] from participating in the players' prayer activities do not interfere with his freedom of association rights, particularly because he is violating the Establishment Clause while doing so." Pet. App. 41a. Likewise, the court concluded that "the School District has the right to issue its guidelines, particularly because it needed to prevent Borden from violating the Establishment Clause." Pet. App. 41a–42a n.15. Indeed, the court rejected Coach Borden's due process claim based on its conclusion that "Borden has no interest—privacy, liberty, or otherwise—in behavior that violates the Establishment Clause." Pet. App. 43a. As such, the court concluded that its interpretation of the Establish-

ment Clause was "necessary" to its ultimate resolution of the case. Pet. App. 45 n.17.

Two of the Third Circuit judges concluded that Coach Borden's silent gestures would violate the Establishment Clause. Pet. App. 5a. They discounted that Coach Borden had not only stopped praying with his players in October 2005, but had also represented that he no longer sought to pray with his players. The lead opinion solely relied upon "Borden's twenty-three years of prior prayer activities[,]" Pet. App. 5a, to support the conclusion that a reasonable observer would construe Borden's silent acts of respect to be an impermissible endorsement of religion regardless of his actual intent. Pet. App. 48a–54a. However, in doing so, it was acknowledged that (i) Borden's two silent gestures of respect, standing alone, were not religious acts; and (ii) were it not for Borden's discontinued prayerful history, his silent gestures of respect would be permitted under the Establishment Clause:

> We agree with Borden that bowing one's head and taking a knee can be signs of respect. Thus, if a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment of reflection or prayer, we would likely reach a different conclusion[.]

Pet. App. 55a.

Judge McKee's concurring opinion, agreed that Coach Borden's silence during player-initiated

prayers violated the Establishment Clause, but disagreed with the statement that there would likely be a different outcome if there had been no history of Borden's prior participation in student prayer. Pet. App. 57a. According to Judge McKee, a reasonable observer "could interpret Borden's proposed actions as an endorsement of religion even absent the coach's history of promoting team prayer[.]" Pet. App. 58a. Judge McKee then further rejected the lead opinion's Establishment Clause analysis by suggesting that the 2006 team's student-led prayers were actually the result of indirect coercion. Pet. App. 60a–70a.

Judge Barry's separate concurring opinion was sharply critical of the majority in three respects. *First*, she would not have allowed respondents to transform the "legal landscape" by going back on "their word" to Coach Borden and the district judge:

> Given my druthers, I would hold defendants to their word and would not entertain, as my distinguished colleagues have so generously entertained, the new issues and arguments raised on this appeal.

Pet. App. 71a–72a. *Second*, Judge Barry disagreed with Judge Fisher's and Judge McKee's application of the endorsement test. She wrote that she would have held Borden's gestures of silent respect did not violate the Establishment Clause:

> Thus, if and when in the future a player decides to initiate prayer, the reasonable observer would know, given Borden's repre-

> sentations, that he did not ask for a prayer; did not select someone to say a prayer; did not monitor the content of the prayer; did not provide a means for broadcasting the prayer; did not join his hands with anyone; and did not mouth the words of the prayer, or say it aloud, or otherwise do anything to put the imprint of the state on the prayer. A reasonable observer would simply see Borden bow his head or take a knee in a silent, unobtrusive sign of respect for the private choices made by individual players who are constitutionally permitted to choose to engage in religious activities.

Pet. App. 73a–74a. *Third*, Judge Barry criticized the religiously hostile consequences of the lead opinion's holding:

> Judge Fisher "would likely" find, as would I, *no* endorsement of religion were a football coach, who had never engaged in prayer with his team, to bow his head or take a knee while his team engaged in a moment of reflection or prayer. *Apparently, it is only Borden, given his prior history, who cannot constitutionally respond to constitutionally protected student-initiated and student-composed prayer* but, if he can, we are not told what response might be permissible. Surely he would not be required to keep his head erect or turn his back or stand and walk away.[] Any such requirement would evidence a hostility to religion that no one would intend.

Pet. App. 74a–75a (emphasis added, footnote omitted).

The court of appeals denied Coach Borden's petition for panel rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

Sixteen years ago this Court held that a public school's official sponsorship of a clergy member's invocation and benediction at a graduation ceremony violated the Establishment Clause. The Court, however, was careful to say that the Establishment Clause permits religious practices in public schools. *Lee v. Weisman*, 505 U.S. 577, 599 (1992). Eight years later, this Court again invalidated a public school's sponsorship of religious activity but also again was careful to say that student religious acts in public schools, such as student prayer, are permitted by the Establishment Clause. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000). As Justice Kennedy wrote in *Lee:* "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. We recognize that . . . *throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. . . . But these matters, often questions of accommodation of religion, are not before us.*" 505 U.S. at 598–599 (citations omitted, emphasis added). In the intervening years, this Court, the lower courts, and public school educators have struggled to resolve exactly how constitutionally protected

student "religious values" and "religious practices" must be responded to by public school educators "throughout the course of the educational process." *Id.* at 599. Unfortunately, when lower courts have examined these inevitable interactions between public school educators and students through the lens of the Court's Establishment Clause jurisprudence, the conflicting results have engendered more confusion than clarity.

This case epitomizes the confusion among all persons involved with public school education and highlights the pressing need for guidance from this Court. Here, a group of high school football players voluntarily chose to follow tradition and engage in a team prayer before every football game. Their coach, Marcus Borden, does not seek to pray with them. He neither encourages nor condemns their choice to engage in student-initiated prayer. He seeks to do no more than to show respect for their religious activity. Yet when Coach Borden asked for guidance, respondents told him only that he could not "participate" in the prayer. When Coach Borden turned to the courts for clarity, four judges have given him four different opinions about the requirements of the Establishment Clause.

Coach Borden's dilemma is pervasive in our public schools. Every public school administrator, teacher, coach and staff member throughout the nation inevitably must, from time to time, respond to constitutionally protected student religious practices that are expressly allowed by this Court's decisions in *Lee, Santa Fe,* and *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S.

226 (1990). Students may, for example, want to pray in their homerooms at the start of a school day, in a cafeteria before meals, before sporting events, at memorial services, or at student club activities. J.A. 247–282. These hundreds of thousands of public school educators must, therefore, regularly confront the question expressly left open in *Lee* and not addressed in *Santa Fe:* How should they respond when confronted with student-initiated constitutionally protected religious exercise? Through its opinions below, the Third Circuit has caused further confusion, shown improper hostility to constitutionally protected private religious exercise, and generated conflict with decisions of this Court and other federal courts of appeals.

First, in conflict with the decisions of this Court and several courts of appeals, the decision below held that Coach Borden's non-religious acts of silent respect violated the Establishment Clause solely because he previously had prayed with his players. This Court, however, has never found an Establishment Clause violation solely based on discontinued prior religious practices. Such a holding is contrary to decisions by other federal circuit courts and is tantamount to permanently branding certain public school educators with a scarlet letter, treating them as Establishment Clause violators even after they have stopped joining in student-initiated prayer.

Second, the Third Circuit's decision forces Borden to engage in conduct that is overtly hostile to his players' voluntary religious acts. Under the ruling below, it is not enough that Coach Borden

merely stop joining with his players in pre-game prayers. Instead, Coach Borden must sequester himself from his team, under threat of insubordination, whenever his players voluntarily pray. As such, the Third Circuit's decision runs afoul of this Court's repeated instructions that the Constitution requires government to respect religion and forbids government hostility to religion. Rather than preventing a constitutional violation, the decision below anomalously requires state actors to violate the Establishment Clause.

This case provides an ideal vehicle for this Court to restore government neutrality to religion in public schools, to clarify Establishment Clause jurisprudential issues that have confused and engendered conflict among the lower courts, to answer the question left open in *Lee* and *Santa Fe*, and to provide much-needed guidance to public school teachers, coaches, staff, and administrators who seek to understand what the Establishment Clause permits and prohibits on those many occasions when they must inevitably respond to the protected religious practices of public school students. The petition for certiorari should be granted.

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS AS TO WHETHER SUBSEQUENT SECULAR SILENT GESTURES OF RESPECT VIOLATE THE ESTABLISHMENT CLAUSE SOLELY BECAUSE OF A DISCONTINUED PRIOR HISTORY OF PRAYER.

The Third Circuit's decision creates an inflexible and unreasonable rule: once an Establishment Clause violator, always an Establishment Clause violator. The Third Circuit held that *even though* Coach Borden had stopped praying with his players, and *even though* his requested acts of silent respect were, standing alone, appropriate under the Establishment Clause, Coach Borden's non-religious conduct nevertheless violated the Establishment Clause because of a history of prayerful activities that ended two and a half years before the Third Circuit decision. Such a holding is inconsistent with this Court's analysis of such history when addressing Establishment Clause claims and contradicts the holdings of several federal courts of appeals.

A. This Court Has Never Held That a Subsequent Secular Government Practice Preceded By A Discontinued Religious History Violates the Establishment Clause.

Though history has long played a role in application of the endorsement test's "reasonable

observer" standard, this Court has never relied on history alone to invalidate a secular act by a state actor. To the contrary, the Court has relied on a history of prior religious activity for two narrow reasons: (i) to corroborate the unconstitutional religious purpose of a government act, or (ii) to expose a proffered secular purpose as a "sham."

For example, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), this Court invalidated a school district's practice of having a student read a prayer over the loudspeaker prior to school football games. Though the school's policy regarding "pre-game ceremonies" at football games had evolved over time, the Court stressed that its inquiry was focused solely on the validity of the most current version of the policy. *Id.* at 297–298. Only *after* concluding that the current policy was facially unconstitutional did the Court turn its attention to other corroborating factors, one of which was the policy's religious history. *Id.* at 307. Using history to corroborate its decision, the Court concluded that the school district's stated secular justifications for the current policy were shams, designed to conceal its true intent to continue the district's historical involvement in religious activity. *Id.* at 308–309.

This Court similarly made a limited use of history in *Edwards v. Aguillard*, 482 U.S. 578 (1987), when it invalidated a Louisiana statute that forbade the teaching of evolution in public schools. Though the state argued that the statute was supported by a secular purpose, the Court concluded that the proffered secular purpose was not furthered by the statute's text. *Id.* at 586–587. The Court

then relied on the statute's history to corroborate that advocacy for "creation science" was actually intended to be a religious act, and therefore that the statute violated the Establishment Clause. *Id.* at 591–592.

Both *Santa Fe* and *Edwards* used religious history to corroborate an independent determination that challenged government practices violated the Establishment Clause because they had a religious character. By contrast, a majority of the panel below agreed that Coach Borden's silent acts of respect, standing alone, were *not* religious in character nor was there any suggestion that Coach Borden's stated secular purposes are "shams." Pet. App. 54a–55a; 72a–75a. Nevertheless, Coach Borden's non-religious acts were held to violate the Establishment Clause solely because of his prior history of prayerful activities with his players. Pet. App. 53a–54a, 70a–72a. In so holding, the Third Circuit opinion rewrites the words of the Establishment Clause to prohibit not only government establishment of religion but also conduct that does nothing more than reflect government respect for religion.

This Court has never held that a state actor is obligated to show hostility for private religious activity because that actor previously engaged in religious activity that has been deemed to violate the Establishment Clause. To the contrary, the Court has rejected the notion that religious history is outcome-determinative under the Establishment Clause, or that past religious conduct "forever taint[s]" all future acts dealing with the same subject matter. *McCreary County v. ACLU*, 545 U.S. 844,

873–874 (2005). Where, as here, a challenged practice has been found to be non-religious, this Court's precedent precludes using religious history to transform a secular act into an Establishment Clause violation. The decision below thus conflicts with this Court's jurisprudence.

The Third Circuit's Establishment Clause ruling is central to the outcome of this case. In the ruling below, Coach Borden's affirmative claims were resolved by the Third Circuit based on its interpretation and analysis of the requirements of the Establishment Clause. *See* Pet. App. 40a–41a (freedom of association claim); *id.* at 41a–42a n.15 (expressive association claim); *id.* at 42a–43a (due process claim). Indeed, the Third Circuit recognized that its analysis of petitioner's claims made it "necessary" to decide the Establishment Clause issue. *See* Pet. App. 45a n.17. Thus, the Third Circuit's Establishment Clause holding is an essential basis for the judgment below. As such, this case is an appropriate vehicle for deciding the question presented.

B. The Third Circuit's Decision Conflicts With Circuit Court Decisions That Have Upheld The Constitutionality Of Subsequent Secular Government Practices Even When Preceded By A Discontinued Religious Activity.

The Third Circuit's opinion directly contradicts decisions of several other federal courts of appeals which have refused to treat subsequent secular government acts as Establishment Clause violations merely because of a discontinued prior religious history.

For example, in a series of cases reviewing "Good Friday" closing laws, the Sixth and Seventh Circuits have held that subsequent secular government practices preceded by a discontinued religious history do not violate the Establishment Clause. First, in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), the Seventh Circuit considered the constitutionality of a state law mandating that Good Friday be treated as a school holiday. The court of appeals invalidated the practice, finding that the law's "purpose was to encourage Christian religious observances." *Id.* at 620–621. But in doing so, the court expressly noted that the state could continue the same practice in the future by adopting a secular justification:

> [W]e have left open the possibility that Illinois can accomplish much the same thing either by officially adopting a "spring weekend" rationale for the law, in place of

> the governor's proclamation of a state religious holiday, or by moving to a system of local option for school districts.

Id. at 623–624. By doing so, the Seventh Circuit rejected any argument that the state's history of religiously motivated Good Friday closings would preclude enactment of a subsequent similar-but-secular school closing statute.

In *Granzeier v. Middleton*, 173 F.3d 568 (1999), the Sixth Circuit took *Metzl* to its logical conclusion. The *Granzeier* court considered a challenge to a Kentucky county's practice of closing county and state courts and offices on Good Friday. *Id.* at 571. In 1995, a court employee announced the closure with "signs bearing an image of the Crucifixion"—signs which all parties agreed were unconstitutional. *Id.* at 571–573. But in spite of this religious history, the Sixth Circuit rejected the argument that the signs "irrevocably established an endorsement of religion, from which Defendants cannot retreat." *Id.* at 574. The court held that the closing practice was supported by secular purposes, and thus would not have the effect of establishing religion despite its blatant religious history. *Id.* at 574–576. It concluded that "future closings will not make a reasonable person think the defendants were endorsing religion," even though the prior religious history "could make a reasonable observer think that Defendants endorsed the Christian religion." *Id.* at 576. In doing so, the Sixth Circuit refused to allow religious history to transform non-religious conduct into an Establishment Clause violation.

A prior panel of the Third Circuit also recognized that religious history could not serve to invalidate subsequent similar secular acts by government actors. In *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999), the court of appeals considered a challenge to a Jersey City "holiday display." The display was a modified version of a display previously struck down by the Third Circuit. The Third Circuit rejected the argument that the religious history of the display created a permanent "unconstitutional taint" that required the new display's automatic invalidation. 168 F.3d at 105. Writing for the Court, then-Judge Alito concluded:

> The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked "a secular legislative purpose," or that it was "intend[ed] to convey a message of endorsement or disapproval of religion."

Id. at 105 (internal citations omitted).

In all three of these cases, the courts of appeals recognized that a subsequent secular government practice preceded by a religious history does not violate the Establishment Clause. Accordingly, the decision below conflicts with these circuit decisions.

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS BECAUSE IT REQUIRES PUBLIC SCHOOL ADMINISTRATORS, TEACHERS, COACHES, AND STAFF TO SHOW HOSTILITY TO STUDENT RELIGIOUS PRACTICES IN ORDER TO AVOID AN ESTABLISHMENT CLAUSE VIOLATION.

In *Lynch v. Donnelly*, this Court recognized that the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." 465 U.S. 668, 673 (1984); *see also Cutter v. Wilkinson*, 544 U.S. 709 (2005) (recognizing that government action respecting and accommodating religion does not violate the constitution). By enjoining Coach Borden from showing respect for his players voluntary prayer acts, the decision below requires public school educators to violate the Establishment Clause by showing disrespect and hostility towards student-initiated religious practices.

A. This Court's Decisions Hold That Under the Establishment Clause Public School Officials Cannot Show Hostility Towards Student Religious Activity.

As Justice Douglas noted in *Zorach v. Clauson*, 343 U.S. 306 (1952), this Court has long recognized that public schools and religion should not be "aliens to each other" nor should they be "hostile, suspicious,

and even unfriendly." *Id.* at 312. Rather, government neutrality towards religion, especially in the public school context, remains a cornerstone of the Establishment Clause. *Id.* at 314 (upholding public school program that "respects the religious nature of our people and accommodates the public service to their spiritual needs").

Decades later, these principles were echoed by both concurring and dissenting opinions in *Lee v. Weisman*, which reiterate that the Establishment Clause requires that the government must respect and accommodate religious activity in public schools. *See* 505 U.S. at 627–629 (Souter, J., concurring) (stating that government respect for religion is evidence of neutrality towards, not endorsement of, religion); *id.* at 637 (Scalia, J., dissenting) (stating that "fostering respect for religion generally" trumps even the government interest in avoiding "the false appearance of participation"). The decision below thus conflicts with this Court's consensus of opinion that the Establishment Clause requires state actors to respect religion.

This Court's opinions in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), provide an example of how a school district's zeal to achieve religious "neutrality" can result, as here, in religious hostility violative of the Establishment Clause. Under the Equal Access Act, public secondary schools who allow non-academic student groups to meet on school property are "prohibited from discriminating against students who wish to conduct a meeting . . . on the basis of the 'religious, political, philosophical, or other content of

the speech at such meetings.'" *Id.* at 235. After the Westside school system refused to accommodate a student's request to form a Christian club, it defended its actions on the grounds that the Equal Access Act violated the Establishment Clause. *Id.* at 249–250. Writing for a plurality, Justice O'Connor stressed that even though the Act provided "incidental benefits" to religious groups, this alone did not amount to an establishment of religion. *Id.* at 248. Rather, allowing religious groups equal access evidenced neutrality, while refusing to do so "would demonstrate not neutrality but hostility towards religion." *Id.* A modicum of respect by the school system was thus required in order to avoid violating the Constitution.

Justice Kennedy, joined by Justice Scalia, concurred separately to stress the concern that application of the Establishment Clause's "endorsement" test could, as here, require state actors to violate the Establishment Clause by showing hostility to religion:

> The plurality uses a different test, one which asks whether school officials, by complying with the Act, have endorsed religion. It is true that when government gives impermissible assistance to a religion it can be said to have "endorsed" religion; but endorsement cannot be the test. The word endorsement has insufficient content to be dispositive. And for reasons I have explained elsewhere, *its literal application may result in neutrality in name but hostility in fact when the question is the government's*

> *proper relation to those who express some religious preference.*

Id. at 261 (Kennedy, J., concurring) (emphasis added).

Such concern is particularly apt in this case. Here, the Third Circuit's decision requires Coach Borden to distance himself physically from his team's religious acts, clearly signaling hostility towards the students' constitutionally protected religious expression. J.A. 169–170. If left unreviewed by this Court, the Third Circuit decision will cause Coach Borden to violate the Establishment Clause every time his players voluntarily choose to say a pre-game prayer.

B. The Third Circuit's Decision Conflicts With Circuits That Have Recognized That Public School Officials Cannot Show Hostility To Religion in Public Schools.

The Third Circuit's decision conflicts with decisions in the Fourth, Fifth, and Sixth Circuits, all of which have stressed that the Establishment Clause forbids public schools from exhibiting hostility towards voluntary acts of student-initiated religious activity.

In *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995), the Fifth Circuit concluded that "neither the Establishment Clause nor the district court's order prevent [school] employees from treating students' religious beliefs and practices with deference and respect; indeed, the

constitution *requires* this. Nothing compels [school] employees to make their non-participation vehemently obvious or to leave the room when students pray[.]" *Id.* at 406. By contrast, the Third Circuit's decision requires Coach Borden to engage in vehement non-participation every time his players pray. This reality was recognized by the district court and Judge Barry's concurrence, as well as confirmed in actual practice by Borden and his players during the 2005 season. J.A. 169; Pet. App. 85a; Pet. App. 74a–75a & n.34.

The Fourth and Sixth Circuits have similarly stressed that when neutrality is not maintained the Establishment Clause is violated. In *Child Evangelism Fellowship v. Montgomery County Public Schools*, 373 F.3d 589 (4th Cir. 2004), the Fourth Circuit rejected a school district's argument that it would violate the Establishment Clause if it allowed a school religious club to circulate "take-home flyers" to students. *Id.* at 592. In rejecting the school district's Establishment Clause concerns, the court of appeals recognized that any danger that a reasonable observer would perceive the school's actions as an endorsement of religion was no greater than the likelihood that students would perceive the school as being hostile towards religion if distribution of the club's flyers were not allowed. *Id.* at 595–596. The Sixth Circuit followed suit in *Rusk v. Crestview Local School District*, 379 F.3d 418 (6th Cir. 2004), which also rejected Establishment Clause concerns about a flyer distribution program on the grounds that denying access to religious groups would constitute hostility, not neutrality, towards protected religious activity. *Id.* at 422–423.

The Third Circuit's analysis of the Establishment Clause was a necessary part of its rejection of Coach Borden's affirmative claims. Enjoined by the Third Circuit from showing silent respect for his student's voluntary prayer activities, Coach Borden must now affirmatively distance himself from their religious acts. Such "vehement" disrespect and hostility for religion, mandated by the Third Circuit's decision, conflicts with decisions of the Fourth, Fifth and Sixth Circuits.

III. THE THIRD CIRCUIT OPINIONS AND CONFLICTING CIRCUIT COURT DECISIONS UNDERSCORE THE PRESSING NEED FOR DEFINITIVE GUIDANCE FROM THIS COURT REGARDING THE OBLIGATIONS UNDER THE ESTABLISHMENT CLAUSE OF PUBLIC SCHOOL EDUCATORS WHEN RESPONDING TO STUDENT-INITIATED RELIGIOUS ACTIVITIES.

The Third Circuit's array of opinions and conflicting circuit court decisions illustrate the well-documented problems that lower courts and public school educators regularly face when deciding how they may constitutionally respond to student-initiated religious activities. Many of these problems stem from the "endorsement test," an analytic framework criticized by members of this Court, lower courts, and legal commentators.

The circuits have long been uncertain of the appropriate amount of contextual or historical

knowledge to assign to the endorsement test's hypothetical reasonable observer. *See, e.g., Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F. 3d 487, 495 n.2 (7th Cir. 2000) (noting "the unresolved dispute which exists within various circuits and within the Supreme Court as to the proper level of understanding to impute onto our mythical reasonable observer"). Lacking clear guidance, they have settled on a wide range of different possibilities when applying the endorsement test. *See e.g., Rusk*, 379 F.3d at 420–421 (in school endorsement case, using reasonable and knowledgeable parent as baseline rather than student); *Marshfield*, 203 F. 3d at 494 (considering viewpoint of "reasonable but unknowledgeable observer") *Kong v. City of San Francisco*, 18 Fed. App'x. 616, 617 (9th Cir. 2001) (same); *Ams. United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1543–1544, 1557–1558 (6th Cir. 1992) (Lively J., dissenting) (disputing proper degree of local knowledge to impute to reasonable observer); *Doe v. Small*, 964 F. 2d 611, 629–630 (7th Cir. 1992) (Easterbrook J., concurring) (viewpoint of "obtuse observer" who mistakenly believes that "the government endorses what it does not forbid" cannot create a constitutional violation).

The inconsistent opinions below highlight the judicial confusion engendered by the "endorsement test," especially in the context of public schools. Judge Fisher's lead opinion purported to rely upon a "reasonable observer" imbued only with historical knowledge:

> [W]e must consider whether a reasonable observer would perceive [Borden's] actions as endorsing religion, not whether Borden intends to endorse religion. A reasonable observer would have knowledge of Borden's extensive involvement with the team's prayers over the past twenty-three years during which he organized, participated in, and led prayer. Based on this history, we hold that a reasonable observer would conclude that Borden is showing not merely respect when he bows his head and takes a knee with his teams and is instead endorsing religion.

Pet. App. 53a–54a (footnotes omitted). On the other hand, Judge Barry relied upon a "reasonable observer" invested with a perspective that was far more comprehensive and contextual:

> [A] reasonable observer would not only have knowledge of [Borden's] history, but would know of all that has taken place leading up to and during this litigation and know that Borden, under oath, has represented what he will and will not do and that he merely wishes to show respect for his players when they pray. A reasonable observer would have no reason to believe that Borden was lying.

Pet. App. 73a. Thus, though Judge Fisher and Judge Barry both agreed that a "reasonable observer"

served as the correct benchmark, they came to opposite conclusions—one concluding Borden's gestures violated the Establishment Clause and the other concluding no violation.

Legal commentators have similarly noted flaws in the endorsement test because it is "driven by ambiguities and analytical flaws" that render the test "ineffectual as a doctrinal tool." Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test,* 86 Mich. L. Rev. 266, 300 (1987); *see also id.* ("Because the test is composed of unmanageable or fatally ambiguous concepts, it cannot provide the needed predictability or guidance for lower courts and governmental entities."). As one commentator explains, the test's primary flaw is that it is "all subjective line-drawing. The basic problem with the endorsement test is that it is no test at all, but merely a label for the judge's largely subjective impressions." Michael Stokes Paulson, *Religion and the Public School After Lee v. Weisman: Lemon is Dead,* 43 Case W. Res. 795, 815 (1993). The endorsement test's reliance on vast judicial discretion has yielded inconsistent results. *See* James A. Campbell, *Newdow Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation,* 39 Akron L. Rev. 541, 555–556 (2006).

If the endorsement test cannot be consistently applied throughout the lower courts, as reflected in the four different judicial opinions Borden has gotten, then public school teachers, coaches,

administrators, and staff cannot realistically be expected to know, or even predict, whether their conduct violates the Establishment Clause. Here, it was only petitioner's religious history .that caused the Third Circuit to render unconstitutional his acts of respectful silence in response to his players' prayers. Yet it is equally reasonable that, under the endorsement test, petitioner's retreat from his religious history reasonably signaled a conscious and effective effort to comply with the Establishment Clause. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001) ("[E]ven if we were to inquire into the minds of schoolchildren in this case, we cannot say that the danger that children would misperceive the endorsement of religion as any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded"). Further, the Third Circuit's lead opinion creates a regime in which Coach Borden's exact actions, if engaged in by another coach in the same school, would be wholly permissible—making consistent interpretation and application of the Establishment Clause impossible even within the same school

Although the endorsement test was designed to ensure consistency of outcomes among the courts when assessing factually similar situations, the test has become an unworkable vehicle by which judges impose their subjective impressions and personal perspectives. The result is court decisions that blur the line between permitted government accommodation and prohibited government establishment of religion, thereby compounding rather than eliminating the guessing that public

educators must daily make about the boundaries of the Establishment Clause. This Court's intervention is therefore necessary to provide guidance to lower courts and public school educators who not only are required, but genuinely want, to ensure that their conduct conforms to the requirements of the Establishment Clause.

CONCLUSION

For the reasons provided above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 10, 2008

APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3890

MARCUS A. BORDEN,
Appellee

v.

SCHOOL DISTRICT OF THE
TOWNSHIP OF EAST BRUNSWICK;
BOARD OF EDUCATION OF THE
TOWNSHIP OF EAST BRUNSWICK;
Dr. JO ANN MAGISTRO, In Her Capacity As
Superintendent, School District Of The
Township Of East Brunswick,
Appellants

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 05-cv-05923)
District Judge: Honorable Dennis M. Cavanaugh

Argued October 3, 2007
Before: McKEE, BARRY and FISHER,
Circuit Judges.

(Filed: April 15, 2008)

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OPINION OF THE COURT

FISHER, Circuit Judge.

Marcus Borden, the head football coach at East Brunswick High School, would like to engage in the silent acts of bowing his head during his team's pre-meal grace and taking a knee with his team during a locker-room prayer. He brought suit seeking a declaratory judgment that the East Brunswick School District's policy prohibiting faculty participation in student-initiated prayer was unconstitutionally overbroad and vague, and violated his federal and state constitutional rights to freedom

of speech, academic freedom, freedom of association, and due process. On cross-motions for summary judgment, the District Court for the District of New Jersey declared the policy unconstitutional on all grounds, and it additionally held that Borden's silent acts would not violate the Establishment Clause of the First Amendment. However, we hold that the policy is not unconstitutional on its face or as applied to Borden. Additionally, we hold that Borden's silent acts violate the Establishment Clause because, when viewing the acts in light of Borden's twenty-three years of prior prayer activities with the East Brunswick High School football team during which he organized, participated in, and even led prayer activities with his team, a reasonable observer would conclude that Borden was endorsing religion when he engaged in these acts. Therefore, and for the reasons set forth in further detail below, we will reverse the District Court's order.

I.

A. Factual History

1. 1983-2005 (Pre-litigation)

Marcus Borden is the head football coach at East Brunswick High School ("EBHS"), and he has

held that position since 1983.[1] During his tenure at EBHS, Borden engaged in two pre-game prayer activities that occurred (1) at the team dinner; and (2) while taking a knee in the locker room.

As part of the pre-game activities for the EBHS football team, the team ate a pasta dinner together at approximately 3:00 p.m. on game day in the high school cafeteria. In addition to the team, parents and other guests, including the cheerleading squad, were present. Prior to the time Borden coached the team to 1997, a local minister, Reverend Smith, said a pre-meal prayer. However, in 1997, the athletic director told Borden that Reverend Smith could not continue to say the prayer. Instead, Reverend Smith wrote a prayer that the students took turns reading. Then, in 2003, Reverend Smith retired, and Borden did not continue to have the students read Reverend Smith's prayer. Borden instead began a new tradition: he said the prayer prior to the first pre-game dinner of the 2003, 2004, and 2005 seasons. For the subsequent weeks of those seasons, Borden asked those attending the dinner to "please stand," and chose a senior player to say a prayer.

In addition to the prayer before the team dinner, Borden led his team in a prayer immediately before the game. Prior to taking the field, Borden and his assistant coaches asked the players to take a knee in the locker room. The team gathered in front of the

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[1] Borden is also a tenured teacher of Spanish at EBHS.

chalkboard or dry erase board on one knee, and at that time, Borden discussed the tactics and strategy for that particular game. Following that discussion, Borden led the team in a prayer. Borden described an example of the prayer he said as follows:

> "[D]ear lord, please guide us today in our quest in our game, our championship. Give us the courage and determination that we would need to come out successful. Please let us represent our families and our community well. Lastly, please guide our players and opponents so that they can come out of this game unscathed, [and] no one is hurt."

The team participated in this tradition for twenty-three seasons, beginning when Borden became the coach of the EBHS football team in 1983 and continuing until the 2005 football season.

On September 26, 2005, Jo Ann Magistro, the Superintendent of the East Brunswick School District ("School District"), received a complaint from a parent about the prayer at the team dinner. The parent told Magistro that she thought it was inappropriate that Borden requested that everyone stand for the prayer and that he bowed his head during the prayer. Over the course of that week, two other parents complained to Magistro about the prayer. One of the complaining parents had a son on the team, and the parent told Magistro that her son felt uncomfortable during the prayer and feared that the coach would select him to say the prayer.

Although Magistro did not contact Borden herself, the EBHS principal and athletic director contacted Borden about these complaints. They told him not to lead the team in prayer, and he responded that he did not lead them in prayer. At the team dinner on September 30, 2005, he continued the prayer traditions in the manner described above. It was alleged that he told the students that if they felt uncomfortable during the prayer, they could wait in the restroom until it was over. Following that game, Magistro received several more complaints.

On October 6, 2005, the School District's counsel, Martin Pachman, advised Magistro and the East Brunswick Board of Education ("Board") regarding Borden's conduct, stating that a coach for the school could not lead, encourage, or participate in student prayer. Magistro met with Borden the next day, October 7, 2005, and told him that all prayer needed to be student initiated, including the selection of which student would recite the prayer. At that time, Borden asked her if he could continue to say the pre-game prayer in the locker room. In response, Magistro contacted Pachman, who answered Borden's questions. At the end of the conversation, Magistro asked Pachman to provide clear guidelines on faculty participation in student prayer.

Later that day, Magistro sent Borden a memorandum and attached the guidelines provided by Pachman. Magistro stated that she recognized Borden's disappointment, but she expected him to comply with the guidelines, and "[n]ot to comply will be viewed as insubordination." The attached

guidelines, which stated that they were not "exhaustive or final," were as follows:

> "1. Students have a constitutional right to engage in prayer on school property, at school events, and even during the course of the school day, provided that:
>
> A. The activity is truly student initiated; and
>
> B. The prayer activity does not interfere with the normal operations of the school district.
>
> This would mean that, for example, if a student or a group of students wish to engage in a prayer before or after their meal in the cafeteria during their lunch period they would have a right to do so, provided that the activity in which they are engaged does not disrupt the normal operation and decorum of the other students eating in the cafeteria. Also, if student athletes on their own decide to hold a prayer huddle before a game, after a game, or during half-time, they have a right to do so.
>
> 2. Neither the school district nor any representative of the school district (teacher, coach, administrator, board member, etc.) may constitutionally encourage, lead, initiate, mandate, or otherwise coerce, directly or indirectly, student prayer at any time in any school-

> sponsored setting, including classes, practices, pep rallies, team meetings, or athletic events.
>
> 3. Representatives of the school district, as referenced above, cannot participate in student-initiated prayer. That very issue was decided by the Fifth Circuit Court of Appeals in a decision cited with approval by the United States Supreme Court and is, therefore, the operative law of the land at this time. To quote the Court, 'If while acting in their official capacities (school district) employees join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion,' and such conduct was prohibited?"[2]

That same evening, Borden resigned, effective immediately, and he did not attend the football game scheduled for that evening. However, on October 17, 2005, Borden withdrew his resignation and agreed to abide by the School District's policy for the remainder of the 2005 season.

The Board held a meeting on October 20, 2005. Michael Baker, the president of the Board, read a

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[2] A similar memorandum was sent out to the entire staff on October 10.

prepared statement ("the Board's statement"). In full, it read:

> "I want to take this opportunity on behalf of the Board of Education, to make some remarks regarding the events that have transpired with our football coach: First and foremost, Dr. Magistro has acted professionally, appropriately and respectfully. She has represented the district and the Board of Education with dignity and class. We sincerely thank her and appreciate the way she has conducted herself. We have instructed Dr. Magistro to get on with running the district and to defer any continuing distractions in this matter to our attorney, Mr. Pachman[,] or to the Board of Education.
>
> Coach Borden, after reconsidering his decision, has rescinded his resignation and continues as coach of the team. He will conduct himself in a manner that is in compliance with the law. We do not believe that there was any deliberate attempt or motive from him to do otherwise. We respect the rights of any employee to disagree with policies, procedures and legal interpretations, but cannot and will not tolerate violations of these rules by any employee of the district. Each of us up here, are elected to serve this community and take an oath of office to respect and defend the Constitution of the United States and there is no ambiguity or gray area for us in

understanding this oath. We will, whenever confronted, follow the laws of our land regardless of personal views or interpretations of these laws. Our employees will do the same. It is our uncompromising expectation that Coach Borden' s personal agenda along with his lawyer[']s, does not in any way interfere with this school district.

The Board of Education will continue to see that our schools run at the highest of standards and with complete respect for the law and for the rights of all of our students and staff. Any comments that come from sources other than the Board of Education, our counsel or the Superintendent are not official and therefore not necessarily representative of our position.

We are a divided nation and have been since the ratification of our Constitution in 1791. Issues of faith are personal and divisive today as they were back then. This meeting and subsequent [Board of Education] meetings are not the forum for such debate, and legal [c]onstitutional rulings are not the purview of the Board of Education. Congress, the President and the Supreme Court[] make, enforce and interpret the laws and these branches of [g]overnment are the appropriate places to lobby for one's position on these matters, not here. This is not a platform for individual agendas on [c]onstitutional cases that have already been clearly decided. I will therefore preside over

> this meeting this evening with these thoughts in mind.
>
> One of the foundations of our democracy is that the right of someone to express concern or to bring a matter of discomfort to the attention of authority is to be respected and protected. It is not to be vilified and dishonored. Some of the extreme language, hateful emails and inappropriate and inaccurate reporting of this story, has shifted blame onto the blameless and has distorted beyond measure the matter at hand. If we can do one thing together as a community, it should be to stand up in vast numbers and express outrage and concern against those who would cheapen the actions of brave and committed Americans. No person should have to be afraid to express their constitutionally protected individual rights. Hopefully, we can all learn from this experience and move forward with dignity and respect for each other. Thank you."[3]

Following the issuance of the October 7 guidelines and the Board's statement on October 20, Borden conducted himself in accordance with the School

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[3] Following the media hype created by this case, EBHS student internet message boards were bombarded with posts, several of which included derogatory comments based on religion and race.

District's new policy for the balance of the school year, notwithstanding the litigation he instituted on November 21, 2005.

2. 2006-Present

Prior to the 2006 football season, Borden sent an email to Sergio Garcia and Randall Nixon, the co-captains of the team for the 2006 season, requesting that they ask the players whether they would like to continue the tradition of praying at the team dinner and prior to the game. In his email request, he told the co-captains that "[w]hatever the players decide to do is fine with me." He asked the captains to pass on the players' response and to ensure him that they spoke with all of the players on the team. Nixon's response indicated that the players voted to continue both the pre-meal and pre-game prayer. Following the grant of summary judgment in his favor in this case, Borden stood and bowed his head during the prayer before the meal, and remained on one knee during the pre-game prayer.

B. Procedural History

On November 21, 2005, Borden instituted this litigation against the School District, the Board of Education, and Magistro in her capacity as Superintendent (collectively, "the defendants") in the Superior Court of New Jersey. The defendants removed the suit to the United States District Court for the District of New Jersey on December 22, 2005. Rather than seeking to continue to do what he had done for the previous twenty-three years, Borden sought "to show his respect for his

players, respect for The Team Prayers, and respect for East Brunswick's football tradition by engaging in two silent acts during The Team Prayers: (i) bowing his head during grace; and (ii) taking a knee with his team in the locker room." His complaint alleged that the guidelines and the Board's statement prevented him from undertaking either of these activities.

Borden's complaint presented two causes of action. Under Count 1, Borden alleged that the defendants violated his rights as embodied in Articles 1, 4, 6 and 18 of the New Jersey Constitution.[4] Count 2 alleged that the defendants violated his Due Process and Equal Protection rights under the Fourteenth Amendment of the United States Constitution. For both of these counts, Borden sought the same relief: (1) a declaratory judgment stating that the guidelines issued on October 7 and the Board's statement on October 20 were unconstitutional based on the respective constitutional provisions; (2)

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[4] In fact, it appears that Borden was not referring to Articles of the New Jersey Constitution, but paragraphs under Article 1. While Article 1 of the New Jersey Constitution establishes individual rights, Article 4 establishes the powers of the New Jersey Legislature, Article 6 establishes the powers Jersey, and Article 18 does not exist. In contrast, the relevant paragraphs of Article 1 provide the following rights: liberty (para. 1), free exercise of religion (para. 4), freedom of speech (para. 6), and freedom of association (para. 18). See N.J. Const. art 1, ¶¶ 1, 4, 6, 18.

preliminary and permanent injunctions preventing the defendants from enforcing the guidelines and the Board's statement, or from "taking any action of any kind, by way of complaint or otherwise, against Coach Borden" for his silent acts of bowing his head and taking a knee during the team's prayers; and (3) an order vacating the guidelines and the Board's statement.

The School District filed a motion for summary judgment that primarily focused on whether its policy was proper under First Amendment jurisprudence, arguing that it did not violate the Free Exercise Clause, and its policy was necessary because Borden's prayer activities violated the Establishment Clause. Borden filed a cross-motion for summary judgment, and expressly stated that he was not asserting a claim under the Free Exercise Clause despite his citation of paragraph 4 of the New Jersey Constitution in his complaint. Borden argued that "his First and Fourteenth Amendment United States constitutional rights as well as Article 1 ¶¶ 1, 6 of his New Jersey constitutional rights" protect his "symbolic conduct."[5] Further, Borden argued that the

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[5] Borden did not specifically assert a claim as to his rights under the First Amendment of the United States Constitution. His complaint did, however, state a claim as to his Due Process rights under the Fourteenth Amendment of the United States Constitution. Thus, Borden arguably asserted a claim under the First Amendment because an individual's free speech rights under the First Amendment apply

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School District's justification for its policy was based on an erroneous interpretation of the Establishment Clause.

On July 25, 2006, the District Court heard oral argument on the summary judgment motions, and following argument, Judge Cavanaugh entered his decision on the record from the bench. He stated:

> "I agree that an Establishment Clause violation would occur if the coach initiated and led the activity, but I find nothing wrong with remaining silent and bowing one's head and taking a knee as a sign of respect for his players' actions and traditions, nor do I believe would a reasonable observer.

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to the states through the Due Process Clause of the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). The defendants have not argued that Borden did not assert a claim under the First Amendment. Even if they had, however, it would not change our analysis, because Borden stated a claim under the free speech clause of the New Jersey Constitution, which has protections that are "generally interpreted as co-extensive with the First Amendment." *Twp. Of Pennsauken v. Schad*, 733 A.2d 1159, 1169 (N.J. 1999) (citing *Hamilton Amusement Ctr. v. Verniero*, 716 A.2d 1137 (N.J. 1998)). Thus, while we do not reach a conclusion on whether he stated a free speech claim under the First Amendment, we will assume that he did for the purposes of our analysis.

> I believe to preclude the Plaintiff from such an action would be a violation of his rights. I believe the Directives as stated are overbroad and vague. To threaten the Plaintiff with insubordination if he is to participate places him in an untenable position.
>
> I find that the Plaintiff's request to bow his head in silence and take a knee do not violate the Establishment Clause of the Constitution.
>
> I find, further, that the Defendants' directive regarding the Plaintiff's nonparticipation is over broad and vague, and violates the Plaintiff's First and Fourteenth Amendment rights to free speech, freedom of association, academic freedom, as well as New Jersey's constitutional rights to liberty and free speech.
>
> Accordingly, since there are no issues of material fact left in dispute, as a matter of law, I deny the Defendants' motion and grant the Plaintiff's motion for summary judgment."

On July 26, 2006, the District Court entered an order denying the defendants' motion for summary judgment, granting Borden's cross-motion for summary judgment, and awarding Borden costs and counsel fees. The defendants' timely appeal followed.

II.

The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1367(a). We have jurisdiction over final judgments of the District Court under 28 U.S.C. § 1291.[6] We

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[6] Borden argues that we do not have jurisdiction over this appeal because it has become moot. He argues that he only sought relief for the 2006 season, and because his coaching contract is subject to annual renewal, a live controversy, as required by Article III, Section 2 of the United States Constitution, no longer exists. However, this appeal contains the factors necessary to warrant a finding that it is not moot. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000). First, the School District has an ongoing injury. *See id.* at 288; see also *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 132 (3d Cir. 2002). The District Court's decision did not pertain to the 2006 season alone. Instead, the District Court found that the guidelines were overbroad and vague, which invalidates the guidelines as applied to any faculty member. *See Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (stating that where a court determines that a statute or policy is overbroad, that ruling "invalidate[s] all enforcement of that law"). Second, Borden continues to have an interest in the present case. *See Pap's A.M.*, 529 U.S. at 288. He is likely to be rehired as the football coach each year because the School District has rehired him each year for twenty-five consecutive years, and more importantly, the School District's guidelines affect him at all times as

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exercise plenary review over a district court's grant of summary judgment, and will uphold the district court's grant of a summary judgment motion on any basis so long as that basis was previously presented to the district court. *Nasir v. Morgan*, 350 F.3d 366, 368 (3d Cir. 2003). Moreover, "[o]ur review over constitutional issues is plenary." *United States v. One Toshiba Color Television*, 213 F.3d 147, 151 (3d Cir. 2000).

III.

The District Court found that the School District's policy prohibiting faculty participation in student-initiated prayer was unconstitutional on its face because it was both overbroad and vague.

It also found that the policy was unconstitutional in its application to Borden because it violated Borden's constitutional rights to freedom of speech, academic freedom, freedom of association, and due process. Finally, it found that Borden's requested silent acts of bowing his head and taking a knee while

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a tenured teacher at EBHS. Finally, "this is not a run of the mill voluntary cessation case . . . [because] it is the plaintiff who, having prevailed below, now seeks to have the case declared moot." *See id.* As in *Pap's A.M.*, we have an interest in preventing litigants from "manipulat[ing] the Court's jurisdiction to insulate a favorable decision from review." *Id.* Therefore, the case before us is not moot, and we have jurisdiction to review it.

his team prayed would not violate the Establishment Clause. We address each of these issues in turn.

A. Overbreadth and Vagueness

Borden challenged the guidelines and the Board's statement on their face, arguing that they are unconstitutionally overbroad and vague. The District Court agreed. For the reasons that follow, the District Court's conclusions are erroneous.

1. Overbreadth

Under the First Amendment overbreadth doctrine, a person may challenge a statute or policy, even though it is not unconstitutional as applied to that particular person, because "[its] very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). A court must consider that the overbreadth doctrine is "strong medicine" that should be used "sparingly and only as a last resort." *Id.* at 613. As a result, "a single impermissible application" is insufficient to deem a statute or policy invalid, *New York v. Ferber*, 458 U.S. 747, 772 (1982) (internal quotation marks and citation omitted), and instead, "a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications." *Id.* at 771.

Thus, the proper inquiry is whether a statute or policy "prohibits a substantial amount of protected expression." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). To determine how broad the

statute or policy sweeps, we look to four factors: (1) "the number of valid applications," (2) "the historic or likely frequency of conceivably impermissible applications," (3) "the nature of the activity or conduct sought to be regulated," and (4) "the nature of the state interest underlying the regulation." *Gibson v. Mayor & Council of Wilmington*, 355 F.3d 215, 226 (3d Cir. 2004) (internal quotation marks and citation omitted).

Based upon the Gibson factors, we conclude that the School District's guidelines and the Board's statement are not unconstitutionally overbroad. Borden argues that this policy will reach beyond impermissible faculty involvement in prayer and, in addition, will prohibit permissible faculty religious exercise. We will address the two relevant paragraphs of the guidelines and the Board's statement separately.

Paragraph two of the guidelines prohibits a school official from "encourag[ing], lead[ing], initiat[ing], mandat[ing], or otherwise coerc[ing]" students into prayer. For this paragraph, the number of valid applications is immense. The Supreme Court has held that a school district is in violation of the Establishment Clause where "the degree of school involvement makes it clear that the [prayer activities] bear the imprint of the State and thus put school-age children who objected in an untenable position." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000) (internal quotation marks and citation omitted). Thus, if a school "affirmatively sponsors the particular religious practice of prayer," it is in violation of the

Establishment Clause. *Id.* at 313. Paragraph two of the guidelines strikes at the heart of this prohibition. Generally, if a school official is engaging in student prayer to the extent that they are leading it, initiating it, or requiring it, the school official, and thus the school district, is violating the Establishment Clause. In fact, Borden does not point to a possible misapplication of this portion of the guidelines. Moreover, the Supreme Court has noted that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995). Therefore, paragraph two of the guidelines is not unconstitutionally overbroad.

Paragraph three of the guidelines prohibits a school official from "participat[ing] in any student-initiated prayer. This paragraph of the guidelines similarly has numerous valid applications. A school district also violates the Establishment Clause if "a reasonable observer familiar with the history and context of the display would perceive the display as a government endorsement of religion." *Modrovich v. Allegheny County*, 385 F.3d 397, 401 (3d Cir. 2004); *see also County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 596 (1989) (adopting the endorsement test). Not every religious display of a school official will have the necessary "history and context" to be an Establishment Clause violation, but to the extent that this paragraph is overbroad, it is not so substantial as to make the guidelines invalid. Rather, any concern about overbreadth may "be

cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16. Moreover, the School District is equally as interested in avoiding Establishment Clause violations in this way. Therefore, paragraph three of the guidelines is not unconstitutionally overbroad.

Borden also takes issue with the Board's statement that it "cannot and will not tolerate violations of these rules by any employee of the district," arguing that the statement does not describe what conduct it prohibits. However, the statement began, "[w]e respect the rights of any employee to disagree with policies, procedures and legal interpretations." It is obvious to us that the rules to which the Board is referring are the recently promulgated guidelines that had been distributed to all faculty only ten days before the October 20 meeting. Because the October 20 statement is simply referring to teachers following the School District's guidelines, the same analysis applies to it as to the guidelines themselves. For the same reasons, we find that the Board's statement is not unconstitutionally overbroad.

2. Vagueness

In a void-for-vagueness challenge, we must ensure that a statute or standard is fair in that it is not so vague that a party would not know what conduct is prohibited. *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1136 (3d Cir. 1992). Thus, a statute is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning."

Broadrick, 413 U.S. at 607 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). .The inquiry is completed on a case-by-case basis, and the party opposing the statute or standard must show that it is vague as applied to him. *San Filippo*, 961 F.2d at 1136. In completing this analysis, it is important to note that, in the civil context, statutes need not be as precise as in the criminal context and are, therefore, less likely to be invalidated under a void-for-vagueness challenge. *Id.* at 1135. Borden claims that the use of the word "participate" renders the guidelines unconstitutionally vague. Standing alone, the word "participate" may be vague. However, "participate" cannot be read in isolation, but must be read in the context of the entire paragraph discussing the prohibition on faculty participation with student-initiated prayer. The paragraph prohibiting faculty participation elaborates on what it considered participation by quoting from the Fifth Circuit's decision in *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995). Thus, the faculty, including Borden, knew that the prohibition on participating in prayer with students included joining hands in prayer or demonstrating some approval of or solidarity with students' prayer. Such a description is "'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . consonant alike with ordinary notions of fair play and the settled rules of law.'" *San Filippo*, 961 F.2d at 1136 (quoting *Connally*, 269 U.S. at 391).

Moreover, we find support that the word "participate" is not vague from the Supreme Court's

decision in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). In *Mergens*, a school district refused access to a Christian student group, and the group brought suit arguing that the school district was in violation of the Equal Access Act, 20 U.S.C. §§ 4071 et seq., which prohibits public secondary schools from denying equal access to student groups. 496 U.S. at 232-33. The school district responded that the Act violated the Establishment Clause and thus was unconstitutional. *Id.* at 233. However, the Court held that the Act did not violate the Establishment Clause. *Id.* at 253. In reaching its decision, the Court relied extensively on a provision of the Act that limited the faculty involvement permissible in any student religious groups to a "nonparticipatory capacity." 496 U.S. at 236, 251- 53 (citing 20 U.S.C. § 4071(c)(3)). The Act does not define "nonparticipatory capacity," and the Court did not define it either. Nevertheless, the Court found that the provision removed the risk of both "official state endorsement or coercion," *id.* at 251, and excessive entanglement with religion, *id.* at 253, because it removed the possibility that school officials would be "participating" in the students' religious activities. Considering the Court's reliance on the "nonparticipatory" provision of the Act without a definition of what the word "participate" means, it is difficult to conceive how the School District's guidelines could be so vague that people of common intelligence could not "guess at [their] meaning." *Broadrick*, 413 U.S. at 607. Therefore, for all of the above reasons, we find

that the guidelines are not unconstitutionally vague.

B. As-Applied Constitutional Challenges

In addition to arguing that the policy prohibiting faculty participation in student-initiated prayer was unconstitutional on its face, Borden also challenged the policy as it applied to him, arguing that it violated his constitutional rights to freedom of speech, academic freedom, freedom of association, and due process. The District Court agreed. Again, for the reasons that follow, the District Court's conclusion is erroneous.

1. Freedom of Speech

The first issue is whether the School District's guidelines and the Board's statement violated Borden's right to freedom of speech under the New Jersey Constitution and the First Amendment of the United States Constitution.[7] The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. This provision applies to the states through the Due Process Clause of the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652,

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[7] We will use federal constitutional principles of free speech rights in our analysis because the free speech clause of the New Jersey Constitution "is generally interpreted as coextensive with the First Amendment." *Schad*, 733 A.2d at 1169.

666 (1925). The Supreme Court has held that the First Amendment prohibits the government from "regulat[ing] speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

The question is whether the First Amendment protects Borden, the employee of a public school system, when he bows his head and takes a knee with his team while they pray. As our case law indicates, "the day has long since passed when individuals surrendered their right to freedom of speech by accepting public employment." *Sanguigni v. Pittsburgh Bd. of Pub. Educ.* , 968 F.2d 393, 396 (3d Cir. 1992) (citing *Connick v. Myers*, 461 U.S. 138, 143-44 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). However, while "public employees enjoy substantial free speech rights," *id.* at 396, those rights are limited. *See Connick*, 461 U.S. at 148-54; *Pickering*, 391 U.S. at 568.

To determine whether the First Amendment protects a public employee's speech, the Supreme Court has established a two-prong test. Under the first prong, the court must determine whether the employee is speaking upon matters of public concern. *Connick*, 461 U.S. at 146. If the employee's speech relates only to his or her personal interest, the First Amendment does not protect the speech because "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146. However, if the employee's speech is on a matter of public interest, the second prong is triggered and requires the court to engage in

the *Pickering* balancing test. *See id.* at 150. The balancing is "between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.[8] Because we find that

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[8] We reject Borden's argument that we should apply the Supreme Court's standard in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), rather than the standard set forth in *Pickering* and *Connick*. In *Tinker*, the Supreme Court specifically identified both students and teachers as those who have First Amendment rights, stating that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. However, the Court in *Tinker* was dealing with a question of the protections given to a student's speech, not a teacher's speech. *Id.* at 513 (holding that students have free speech rights unless the student's conduct "for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others"); *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988) (noting that *Tinker* involved a question of student speech). More importantly, *Tinker* did not alter the test that the Supreme Court established to evaluate the speech of a public employee in *Pickering*, 391 U.S. at 568, and then *Connick*, 461 U.S. at 146. *Pickering* involved a teacher who wrote a letter to a

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Borden's speech was not on a matter of public concern, we do not need to engage in the *Pickering* balancing test.

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newspaper expressing concern regarding the management of the school district, and the Court held that the teacher, as a public employee, had a right to freedom of speech. 391 U.S. at 574-75. *Connick* elaborated on the proper test for the speech of a public employee. *See* 461 U.S. at 146-50. Therefore, our application of *Pickering* and *Connick* is appropriate in these circumstances.

i. Matter of Public Concern[9]

Under the test established in *Pickering* and *Connick*, we must first determine whether Borden's silent acts of expression are on a matter of public concern. Borden alleges two interests that his silent acts serve: (1) providing the team with feelings of unity and increasing team morale; and (2)

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[9] Borden argues that we may not address this issue because the defendants did not argue that the speech was not on a matter of public concern in their initial brief or their reply brief before the District Court. However, "`[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.'" *Tenafly Eruv Assoc., Inc. v. Borough of Tenafly*, 309 F.3d 144, 158 n.15 (3d Cir. 2002) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)). Thus, we must engage in a proper constitutional analysis of whether Borden has a free speech right to engage in his proposed silent acts regardless of what legal theory he or the defendants argued at any point in this litigation. Here, a proper constitutional analysis requires us to consider whether Borden's speech was on a matter of public concern before we make any other determinations. Therefore, not only are we not prohibited from engaging in step one of the *Connick* test, we must do so.

respecting the players' prayers.[10] For the reasons that follow, we find that Borden's stated interests are personal to Borden and his team and are not matters of public concern

Connick instructs that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." 461 U.S. at 147-48.[11] The content of speech on a matter of public concern generally addresses a social or political concern of the community. For example, we have stated that speech is on a matter of public concern if it "relate[s] to broad social or policy issues," including expressing the desirability of assassinating the President or complaining about racial discrimination. *Sanguigni*, 968 F.2d at 397 (citing

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[10] To the extent that Borden argues that his speech protects student-initiated prayer, his argument is unfounded. He would like to bow his head during a pre-meal grace and take a knee with his team before a game. These silent acts do nothing to protect student-initiated prayer because the students are able to engage in student-initiated prayer regardless of Borden's silent acts. Thus, we find his argument unavailing.

[11] Contrary to Borden's contention, this question is one of law, and thus is properly considered by a reviewing court. *Connick*, 461 U.S. at 148 n.7 ("The inquiry into the protected status of speech is one of law, not fact.").

Rankin v. McPherson, 483 U.S. 378, 386-87 (1987); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979)). We have also categorized speech "implicat[ing] the discharge of public responsibilities by an important government office, agency, or institution" as speech addressing a matter of public concern. *See id.* at 397-98 (citing cases involving speech that touched on the pressure to work on political campaigns, the allocation of funds to certain school programs, government corruption, and the lowering of academic standards and its effects); *see also Holder v. City of Allentown*, 987 F.2d 188, 195 (3d Cir. 1993) (stating that speech is on a matter of public concern where "the speaker seeks to 'bring to light actual or potential wrongdoing or breach of public trust' on the part of government officials" (quoting *Connick*, 461 U.S. at 148)). Finally, the content of speech is on a matter of public concern where it "relate[s] primarily to the way in which a government office [i]s serving the public." *Sanguigni*, 968 F.2d at 398 (citing *Czurlanis v. Albanese*, 721 F.2d 98 (3d Cir. 1983), in which a county employee criticized the state and county governments at a meeting of the county's governing body regarding how he thought those governments were wasting taxpayer's money). In short, the content of these types of speech goes to the core of the First Amendment because it adds to the debate on matters of public importance.

In contrast, the content of an employee's speech is not a matter of public concern where the comments are only with regard to the morale of the office. *See Connick*, 461 U.S. at 148 (holding that the employee's

questionnaire regarding office morale was not a matter of public concern because she was merely gathering "ammunition" against her supervisors); *Sanguigni*, 968 F.2d at 399 (holding that an employee's statements regarding morale alone do not rise to the level of a matter of public concern). In *Connick*, the Supreme Court noted that the level of morale in a government office may relate to the efficiency of that office, and the public may be interested in that efficiency. 461 U.S. at 148. However, where the employee's efforts did not focus on relaying that information to the public, it could not be speech on a matter of public concern. *Id.* at 148 & n.8.

In the present case, Borden portrays the content of his conduct as secular gestures intended to promote solidarity, help form the team into a cohesive family unit, and show respect for the players' prayers. The content of his message, however, is not a matter of public concern. Borden does not perform these silent acts as part of a broad social or policy statement of being able to take a knee or bow his head in public.[12] Additionally, he is not shedding light on any matter with regard to EBHS's operations that would be important to the public because his silent acts do not touch upon the way in which a government institution is discharging its responsibilities. *See, e.g.*, *Pickering*, 391 U.S. at 569-70 (finding that

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[12] Borden does not allege that his silent acts are religious speech that is on a matter of public concern, and we do not reach that question.

criticisms of a school district's allocations of funds is speech on a matter of public concern). Instead, Borden expressly argues that he wishes to engage in this speech out of concern for his team's morale. However, he is not trying to bring public morale issues within the school's administration, but is merely trying to bolster his team by demonstrating that "this team is a family," which does not amount to a matter of public concern. See *Connick*, teacher's criticism of the school district in a letter to a newspaper).

In the present case, the form and context of Borden's silent acts only reinforce its non-public nature. Borden's speech does not occur in any type of official proceeding, and even more importantly, Borden's speech does not extend into any type of public forum. In fact, Borden himself admits that the bowing of his head and taking of a knee occur in private settings, namely at an invitation-only dinner and in a closed locker room. Again, we find further support for this decision in the Sixth Circuit's opinion in *Dambrot*, where the court noted the private nature of the coach's message to his players because the coach's pep talk was given in a locker room for the private consumption of his players. 55 F.3d at 1188. Thus, we conclude that as in *Dambrot*, the bowing of Borden's head and taking a knee are meant for the consumption of the football team only. Therefore, Borden's expressive conduct of bowing his head and taking a knee are not matters of public

concern triggering protection of his right, as a public employee, to freedom of speech.[13]

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[13] Based on our prior decisions, as well as the decisions of other courts of appeals, Borden's actions do not constitute speech on a matter of public concern regardless of the application of the Supreme Court's most recent case in the line of cases on the free speech rights of public employees. *See Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). In *Garcetti*, the Court considered whether the First Amendment protects a public employee's speech when the employee speaks pursuant to his or her official duties. *Id.* at 1960. It held that the analysis established by *Pickering* and its progeny applies only when an employee speaks as a citizen. *Id.* Thus, the First Amendment simply does not protect speech made pursuant to the employee's official duties. *Id.* After reaching its conclusion, the Court expressly stated that it left the determination of whether this analysis would apply in the educational context for another day. *See id.* at 1962 ("We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."). If *Garcetti* applied to this case, Borden's speech would not be protected as it was made pursuant to his official duties as a coach of the EBHS football team and not as an ordinary citizen. However, even if *Garcetti* does not apply in the educational context, Borden's conduct is not on a

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ii. *Pickering* Balancing Test

We find it unnecessary to engage in the *Pickering* balancing test in the present case because Borden does not have a free speech right that would trigger the analysis. In order to utilize the balancing test, the public employee must have a free speech right to weigh against the government's interest in prohibiting the speech. However, Borden's silent acts of bowing his head and taking a knee are not on matters of public concern so he does not have a free speech right to trigger the balancing test. For the above reasons, we conclude that the guidelines and the Board's statements did not violate Borden's free speech rights under the First Amendment of the United States Constitution and under the New Jersey Constitution.

2. Academic Freedom

Borden argues that the right to academic freedom affords him the right to exercise professional judgment in teaching his players respect for others, or as he calls it, "Character Education." In making this argument, Borden specifically points out that he is both a football coach and a tenured teacher at EBHS, and states that "[he] believes in teaching [the players] how to be persons of good character and principle."

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matter of public concern for the reasons just described.

We have held that a teacher's in-class conduct is not protected speech. *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) ("Although a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected, her in-class conduct is not." (internal quotation marks and citations omitted)). The rationale for this holding is that the teacher is acting as the educational institution's proxy during his or her in-class conduct, and the educational institution, not the individual teacher, has the final determination in how to teach the students. *See Brown v. Armenti*, 247 F.3d 69, 74-75 (3d Cir. 2001).

In order to determine if the teacher's conduct is considered in-class conduct, we must determine whether the teacher is engaging in one of the "four essential freedoms" that constitute academic freedom. *Id.* at 75. The 'four essential freedoms'" include the right of an educational institution "to choose 'who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 492 (3d Cir. 1998) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)). Based on this analysis, we have previously determined that a teacher's in-class conduct includes choosing one's own teaching methods, *id.* at 491-92, utilizing one's own "classroom management technique," *Bradley*, 910 F.2d at 1176, and assigning grades to a student, *Brown*, 247 F.3d at 75.

In the case before us, Borden concedes that the silent acts of bowing his head and taking a knee are tools that he uses to teach his players respect and

good moral character. Thus, by his own admission, his coaching methods are pedagogic. As a result, he is acting as a proxy for the School District, and the School District may choose both how its students are taught and what its students are taught. Here, the School District adopted Pachman's guidelines because it determined that Borden's pedagogic methods were inappropriate. As evidenced by this continued litigation, the School District continues to find Borden's pedagogic methods of teaching his players respect by engaging in his silent acts inappropriate. While Borden certainly has the right to voice his disagreement with the School District's policy, in accord with our past precedent, he does not have a right to act in contravention of the School District's policy based upon a right to academic freedom.[14] For the above reasons, the

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[14] Borden alleges that a decision that he does not have the academic freedom to engage in these acts amounts to controlling his mind. However, our precedent has consistently demonstrated that it is the educational institution that has a right to academic freedom, not the individual teacher. *See, e.g., Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001). The teacher, in turn, has the right to speak on matters of public concern, including advocating certain pedagogic methods. *See Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998) ("[A]lthough [a teacher] has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the

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District Court erred in holding that the guidelines and the Board's statement violated Borden's right to academic freedom.

3. Freedom of Association

Borden's complaint also alleged, and the District Court held, that the School District's guidelines and the Board's statement violated Borden's right to freedom of association. Specifically, he asserts that First Amendment jurisprudence demonstrates that the policy infringes on his "right to associate with his players by forcibly segregating [him], both physically and mentally, from his players while they engage in the important team act of saying pre-game prayers." However, we find this argument unavailing.

While the Supreme Court has held that the Constitution protects certain relationships, those protected relationships require a closeness that is not present between a high school football coach and his team. The Court has not limited the protection to familial relationships, but generally the protected relationships include "marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives." *See Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987) (citations omitted); *id.* at 546-47 (not extending the protection to the Rotary Club). We do not doubt that

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classroom."). However, the teacher cannot act in contravention of his or her educational institution's in-class policies in the name of academic freedom.

football coaches have a special relationship with the players on their team. However, the relationship is typically not so close as to involve "'not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'" *Id.* at 545 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619-20 (1984)). Therefore, we find that the guidelines prohibiting him from participating in the players' prayer activities do not interfere with his freedom of association rights, particularly because he is violating the Establishment Clause while doing so. *See infra* Part III.C.[15]

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[15] While Borden's argument is not entirely clear, he may also be asserting an expressive association claim. To the extent that Borden makes this argument, we deem it to fail. The football team must be an "expressive association" for it to fall within the ambit of the First Amendment's protection. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). To be an "expressive association," the group does not need to be an advocacy group, but it "must engage in some form of expression, whether it be public or private." *Id.* The Supreme Court has held that the Boy Scouts engage in expressive association because the organization seeks to instill values in the youth members. *Id.* at 649-50.

Borden argues that, as a football coach, he similarly instills values in the members of his team. However, unlike the Boy Scouts in *Dale*, Borden is instilling values in the team as part of his duties as a

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4. Due Process

Borden also argues that the guidelines and the Board's statement violated his rights to due process. In the context of school district policies, we have previously stated that the same test for vagueness applies to a procedural due process claim. *Bradley*, 910 F.2d at 1177. Thus, a rule prohibiting conduct must not be "in terms so vague that people of common intelligence must guess as to its meaning..." *Id.* As indicated by the discussion above, the guidelines and the Board's statement were not unconstitutionally vague. *See supra* Part III.A.2.

Therefore, Borden must point to a fundamental right that he has which the policy infringed upon in order to establish a due process violation. He can do no such thing. Borden tries to cite to federal case law regarding privacy rights, such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Lawrence v. Texas*, 539 U.S. 558 (2003), to argue that the School District has intruded upon his privacy, thoughts, autonomy, desires and wishes. He claims that the School District's requirement that he not engage in taking a knee and bowing his head degraded him as a

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public school employee and not as part of a private association. As discussed in part III.C of this opinion, *see infra*, the School District has the right to issue its guidelines, particularly because it needed to prevent Borden from violating the Establishment Clause. Therefore, we find any expressive association argument that Borden is attempting to make to be invalid.

person and humiliated him in front of his team. However impassioned Borden's arguments may be, they lack any basis in the law. Borden has no interest — privacy, liberty, or otherwise — in behavior that violates the Establishment Clause.[16] For these reasons, the guidelines and the Board's statement did not infringe on Borden's due process rights.

C. The School District Had a Right to Adopt the Guidelines Because It Was Concerned About Establishment Clause Violations.

As discussed above, the School District's guidelines and the Board's statement were not unconstitutional on their face and did not violate Borden's constitutional rights. We have previously held that, where an official at a public school does

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[16] Borden attempts to argue that the New Jersey Constitution provides him greater due process protections than the U.S. Constitution. Under the New Jersey Constitution, claims involving fundamental rights are to be analyzed using a balancing test, "consider[ing] the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985). However, the balancing here has the same result as under federal constitutional principles because the public need — to prohibit Establishment Clause violations, which as discussed below, are present in this case — is so great. Therefore, Borden's argument fails.

not have a First Amendment right to his or her expression, the school district's policy does not need to be "reasonably related to a legitimate educational interest." *See Edwards*, 156 F.3d at 491. Thus, because Borden has no First Amendment right to his silent acts, we do not need to analyze the policy under this standard. However, even if we applied that standard to the present case, we would arrive at the same result: the School District had a right to adopt its policy.

The School District has a legitimate educational interest in avoiding Establishment Clause violations, and the guidelines are reasonably related to that interest. The Supreme Court has stated that "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Pinette*, 515 U.S. at 761-62; *see also Locke v. Davey*, 540 U.S. 712, 730 n.2 (2004) (Scalia, J., dissenting) (IA] State has a compelling interest in not committing *actual* Establishment Clause violations."). If compliance with the Establishment Clause can rise to a compelling state interest, surely it is a legitimate educational interest. Moreover, the guidelines are related to that interest because, as discussed in the overbreadth and vagueness analysis, the prohibited conduct would violate the Establishment Clause. In fact, based on the history and context of Borden's conduct in coaching the EBHS football team over the past twenty-three years, Borden is in violation of the

Establishment Clause when he bows his head and takes a knee while his team prays.[17]

Under the Establishment Clause of the First Amendment, "Congress shall make no law respecting

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[17] The defendants suggest that we do not need to reach the issue of whether Borden's requested actions, to bow his head and take a knee while his team prays, constitute an Establishment Clause violation. Borden's complaint did not make any allegations regarding the Establishment Clause; the Establishment Clause only surfaced in the cross-motions for summary judgment to the District Court because the defendants thought that Borden was asserting a Free Exercise claim, which he was not. However, in reaching its decision, the District Court found "that the Plaintiff s request to bow his head in silence and take a knee do not violate the Establishment Clause of the Constitution." This decision was a declaratory judgment because it "declare[d] the rights and other legal relations" of the interested parties. 28 U.S.C. § 2201. The District Court was within its right to grant a declaratory judgment. *See* Fed. R. Civ. P. 57. But we must now review the district court's decision, *see* 28 U.S.C. § 2201, and in reviewing a decision to grant a declaratory judgment, "we will exercise plenary review over the district court's conclusions of law." *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 30 (3d Cir. 1995). Therefore, we find it necessary to reach the District Court's conclusion of law.

an establishment of religion." U.S. Const. amend. I. This provision applies equally to the states, including public school systems, through the Fourteenth Amendment. *See Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985). The Supreme Court has set forth three tests for determining whether governmental action violates the Establishment Clause: the coercion test, the *Lemon* test, and the endorsement test. *Modrovich*, 385 F.3d at 400-01. We do not address whether Borden's conduct violates the Establishment Clause under the coercion[18] and *Lemon*[19] tests because we find that Borden's behavior violates the Establishment Clause under the endorsement test.

The endorsement test applies "[i]n cases involving state participation in a religious activity." *See Santa Fe*, 530 U.S. at 308. For example, in *Santa Fe*, the leading case on prayers before high school football

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[18] The coercion test looks at whether the government is "coerc[ing] anyone to support or participate in religion or its exercise . . .." *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

[19] The *Lemon* test, named after the Supreme Court case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), established a three-prong test, holding that conduct violates the Establishment Clause "if (1) it lacks a secular purpose, (2) its primary effect either advances or inhibits religion, or (3) it fosters an excessive entanglement of government with religion." *Modrovich*, 385 F.3d at 401 (citing *Lemon*, 403 U.S. at 612-13).

games, the Supreme Court used the endorsement test in considering whether a school district violated the Establishment Clause where its policy allowed a student to deliver a pre-game prayer based on a voting system. *Id.* Here, Borden, an employee of the School District as both the head football coach and a tenured teacher, would like to bow his head and take a knee while students pray. Thus, the endorsement test is applicable here because these facts involve a state employee engaging in the religious activity of students in some fashion.

The relevant question under the endorsement test is "whether a reasonable observer familiar with the history and context of the display would perceive the display as a government endorsement of religion." *Modrovich*, 385 F.3d at 401; *see also Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. at 596 (adopting the endorsement test). The test does not focus on the government's subjective purpose when behaving in a particular manner, but instead focuses on the perceptions of the reasonable observer. *Modrovich*, 385 F.3d at 401.

The history and context of Borden's prayer activities with the team, if challenged, could have been Establishment Clause violations. In a case that is similar to the facts of the present case prior to the School District's enactment of the policy, the Court of Appeals for the Fifth Circuit found that a basketball coach's involvement in prayer "signal[ed] an unconstitutional endorsement of religion." *Duncanville*, 70 F.3d at 406. In *Duncanville*, a basketball coach recited the Lord's Prayer with his players during practices and after games. *Id.* at 404.

Parents of the students challenged this practice, and the district court granted an injunction which prohibited "[the school district], its employees and its agents from: leading, encouraging, promoting, or participating in prayers with or among students during curricular or extracurricular activities, including before, during, or after school-related sporting events.. .. Students may voluntarily pray together, provided such prayer is not done with school participation or supervision." *Id.* at 405-06. The school district challenged the district court's injunction, arguing that this prohibition violated its employees' rights to free exercise of religion, freedom of association, freedom of speech, and academic freedom. *Id.* at 406. The Fifth Circuit disagreed, stating that the government's facilitation of the free exercise of religion or free expression rights cannot "'supersede the fundamental limitations imposed by the Establishment Clause.'" *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 586-87 (1992)). In addition, the context of the challenged prayer activities, which occurred during "school-controlled" activities that the team must attend, demonstrated that the coaches' "actions [were] representative of [school district] policies." *Id.* Thus, the Fifth Circuit upheld the District Court's injunction, finding that the coaches' participation was "an unconstitutional endorsement of religion." *Id.*

Likewise, Borden's past conduct "signals an unconstitutional endorsement of religion." *Id.* For twenty-three years, Borden led the team in a pre-game prayer in the locker room. During that same period of time, Borden orchestrated a pre pre-meal

grace for his team. He originally had a chaplain conduct the pre-meal grace. This practice changed only after school officials asked him to stop; then he had the chaplain write the grace and he selected seniors on the team to recite it. Additionally, during at least three seasons, Borden led the team in the first prayer of the season. Both of these activities, the locker room preparations and the pre-game meals, were school-sponsored events. As in *Duncanville*, Borden's involvement in prayer at these two activities — as a participant, an organizer, and a leader — would lead a reasonable observer to conclude that he was endorsing religion.

In analyzing Borden's request to engage in silent acts with his teams, we must consider all of his prior prayer activities with his team as the Supreme Court did in *Santa Fe*. For many years, the Santa Fe Independent School District began each high school football game with a prayer led by the "Student Chaplain." *Santa Fe*, 530 U.S. at 294, 309. After realizing that such conduct would violate the Establishment Clause, the school district developed a two-step student election process, which allowed students to (1) first decide whether an invocation would be given at the beginning of a game; and (2) then elect the speaker to give the invocation. *Id.* at 306. The Supreme Court considered the many years of pre-game prayers at the school, and the evolution of the policy, including the name "Prayer at Football Games" and its stated purpose, which is to "solemniz[e] the occasion. *Id.* at 308-09. It found that "an objective Santa Fe High School student will unquestionably perceive the inevitable pre-game

prayer as stamped with her school's seal of approval." *Id.* at 308. Moreover, it stated that all of these factors indicated that the purpose of the policy was to preserve the popular pre-game prayer, regardless of the school district's stated purposes. *Id.* at 309. Thus, it found that the policy failed the endorsement test and violated the Establishment Clause. *Id.* at 308-10.

Similarly to *Santa Fe* and as discussed above, the current controversy is built upon a significant history of pre-game prayers that involved Borden. Borden organized prayers for the pre-meal grace at the team dinner; he had a chaplain say a prayer and then selected seniors to say the prayer. But even more importantly, Borden led prayers himself-- on at least three occasions for the pre-meal grace, and before each game for twenty-three years for the locker room prayer. Additionally, when EBHS officials asked Borden to discontinue this conduct, he initially resigned from his position as coach of the team rather than continue as coach without engaging in the prayer activities. This history of Borden's prayers with the football team leads to a reasonable inference that his current requested conduct is meant "to preserve a popular 'state-sponsored religious practice'" of praying with his team prior to games. *Santa Fe*, 530 U.S. at 309 (citing *Lee*, 505 U.S. at 596).

Borden has stated that his intention in taking a knee and bowing during prayer is to show signs of

respect to his team, not endorse religion.[20] Borden attempts to support this argument by pointing to language in *Duncanville*, which states that "neither the Establishment Clause nor the district court's order prevent [school district] employees from treating students' religious beliefs and practices with deference and respect; indeed, the constitution requires this. Nothing compels [school district] employees to make their non-participation

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[20] As an employee of the School District as both a coach and tenured teacher, Borden's actions can be imputed to the School District. For this reason, Borden's claim that the School District could remove any Establishment Clause violation by writing a disclaimer saying that Borden's speech does not represent the ideals of the School District is simply wrong. Although the Supreme Court has previously suggested disclaimers as a way to demonstrate that a school district is not endorsing religion, *see Bd. of Educ. v. Mergens*, 496 U.S. 226, 251 (1990), that was only applicable in the context of permitting student clubs of a religious nature to meet on school grounds. The Court reasoned that "there is li[illegible] if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." *Id.* The circumstances are different where, as here, a school official could reasonably be perceived as engaging in the students' prayer activities. Therefore, a disclaimer by the School District would not remove the Establishment Clause violation.

vehemently obvious or to leave the room when students pray . . . ." *Duncanville*, 70 F.3d at 406 n.4.[21]

However, we find Borden's argument to be unavailing. First, the inquiry is not whether Borden intends to endorse religion, but whether a reasonable observer, with knowledge of the history and context of the display, would conclude that he is endorsing religion. *See Modrovich*, 385 F.3d at 401. Additionally, Borden fails to note that the Fifth Circuit does not permit any respectful display to pass muster in evaluating the constitutionality of the display. *See Duncanville*, 70 F.3d at 406 n.4. Instead, the Fifth Circuit, in the sentence immediately following the above quote, stated that, "if while acting in their official capacities, [school district] employees join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion." *Id.* Thus, Borden's reliance on Duncanville is only partially accurate because the respectful display is

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[21] Borden also invokes the football greats, like Bear Bryant, to indicate that taking a knee is merely a gesture in the land of football. However, although taking a knee in a huddle to discuss strategy is a gesture well known to football gurus as being part of the game, Borden said a prayer while taking a knee with his team for over twenty-three years. Based on this undisputed history, a reasonable EBHS player would conclude that Borden is endorsing religion if he continues to take a knee while his team prays.

permissible only if it does not "cross the line" and endorse religion.

We find that, based on the history of Borden's conduct with the team's prayers, his acts cross the line and constitute an unconstitutional endorsement of religion. Although Borden believes that he must continue to engage in these actions to demonstrate solidarity with his team, which is perhaps good for a football team's unity, we must consider whether a reasonable observer would perceive his actions as endorsing religion, not whether Borden intends to endorse religion. A reasonable observer would have knowledge of Borden's extensive involvement with the team's prayers over the past twenty-three years during which he organized, participated in, and led prayer.[22] Based on this history, we hold that a

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[22] Borden argues that the reasonable observer would also be familiar with the School District's previous treatment of religion. He references *Pope v. East Brunswick Board of Education*, 12 F.3d 1244, 1254 (3d Cir. 1993), a case in which the School District was admonished for searching the Equal Access Act for loopholes that would allow it to deny a religious club access to the school after hours. Borden argues that this case shows the School District's disdain for religion, and as a result, the reasonable observer would not consider his actions to be religious. However, even if the observer knew of the School District's former problems with religious organizations, the observer would also know that for at least ten years following the *Pope* case, Borden, a

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reasonable observer would conclude that Borden is showing not merely respect when he bows his head and takes a knee with his teams and is instead endorsing religion.[23]

Without Borden's twenty-three years of organizing, participating in, and leading prayer with his team, this conclusion would not be so

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school official, was involved in prayer activities at the team dinner, and even more importantly, led a team prayer before each game. With this knowledge, the reasonable observer would view Borden's conduct as endorsing religion despite any conflicts with religious organizations that the School District had fifteen years ago.

[23] As additional evidence of an Establishment Clause violation, the defendants argue that the pre-game prayers were not truly student initiated. They suggest that by sending the email to the team captains asking them to poll the team about the prayers and then asking for the results, Borden himself initiated the prayers. The defendants' argument is supported by the Supreme Court's decision in *Santa Fe*, 530 U.S. at 317, which found that a school district violated the Establishment Clause when it sponsored a student vote on student-led prayer. However, we need not make this determination because even if the pre-game prayers were truly student initiated, Borden's participation in them by bowing his head and taking a knee violate the Establishment Clause for the reasons discussed.

clear as it presently is. We agree with Borden that bowing one's head and taking a knee can be signs of respect.[24] Thus, if a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment of reflection or prayer, we would likely reach a different conclusion because the same history and context of endorsing religion would not be present.[25]

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[24] Judge Barry agrees with this statement. *See* Con. Op. at 70 (Barry, J., concurring) (labeling Borden's actions as "silent, unobtrusive sign[s] of respect").

[25] In his concurring opinion, Judge McKee points to a picture of Borden with his team. *See* Con. Op. at 55-57 (McKee, J., concurring). In doing so, he suggests that a reasonable observer could "conclude that the coach is praying with his team - perhaps even that he is leading the team in prayer," *id.*, even if there was no history of the coach praying with his team. We cannot agree with this conclusion because this photograph, standing alone, would be insufficient to satisfy the "fact-specific, case-by-case" inquiry required. *Id.* at 2 (quoting *Modrovich*, 385 F.3d at 402). For a court to complete the required analysis, it would need to consider additional facts, including, for example: (1) Is the team engaging in a moment of silence, or is someone speaking? (2) If a person is speaking, is he saying a prayer? (3) If it is a prayer, is it a player or the coach reciting the prayer? and (4) Who decided to say the prayer? Only after knowing these facts, as well as the coach's history of prayer

(continued..)

However, in Borden's case, the conclusion we reach today is clear because he organized, participated in, and led prayer activities with his team on numerous occasions for twenty-three years. Thus, a reasonable observer would conclude that he is continuing to endorse religion when he bows his head during the pre-meal grace and takes a knee with his team in the locker room while they pray.

IV.

For all of the above reasons, we conclude that the guidelines and the Board's statement were not unconstitutional on their face, were not unconstitutional as applied to Borden, and in fact, were necessary for the School District in order to avoid Establishment Clause violations. Therefore, we will reverse the District Court's order.

McKEE, Circuit Judge, concurring.

I join Judge Fisher's lead opinion, but write separately to clarify a few points, and express a few concerns. At the outset, I emphasize that we today hold only that (i) the School District's policy is not overbroad and vague; (ii) the policy did not violate Borden's constitutional rights to free speech, freedom of association, academic freedom, or due process; and (iii) under the circumstances here, Borden's practice of bowing his head and "taking a

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activities with his team, could any court make the determination required under the endorsement test.

knee" as his team prays violates the Establishment Clause.[26]

However, I do not join my colleagues' suggestion that we might reach a different result here absent Borden's 23-year history of promoting team prayer. That question is not before us, and I believe that Borden's "respectful display," see Con. Op., *infra*, at 69 (Barry, J., concurring), might well violate the Establishment Clause even absent his 23-year history. Similarly, I can not agree that the football team's pregame ritual can accurately be characterized as "student-initiated" prayer.

I.

In reaching our holding, the lead opinion suggests: "[I]f a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment of reflection or prayer, we would likely reach a different conclusion . . ." *Supra*, at 52; *see also* Con. Op., *infra*, at 71 (Barry, J., concurring). I am not as sure. Although I agree that would be a more difficult case, it is not clear to me that our Establishment Clause inquiry would yield a different result. "[E]very Establishment Clause challenge requires a fact-specific, case-by-case analysis."

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[26] 'Both of my colleagues, as well as the district court and the parties, refer to Borden's conduct as "taking a knee." Accordingly, I will also use that phrase.

Modrovich v. Allegheny County, 385 F.3d 397, 402 (3d Cir. 2004). As discussed in the lead opinion, our Establishment Clause inquiry here turns on whether an objective observer would interpret Borden's proposed actions as a state endorsement of religion. *Supra*, at 38. I believe such an observer could interpret Borden's proposed actions as an endorsement of religion even absent the coach's history of promoting team prayer.

Coach Borden's suit against the School District did not seek a declaration "permitting him to pray with his players," Borden's Br. at 9, but rather "a declaration that he be allowed ... to continue to demonstrate respect for his players by silently bowing his head and taking a knee during The Team Prayers." Compl. ¶ 18. However, as Judge Fisher's lead opinion explains, it is not Coach Borden's subjective intent that controls whether his conduct runs afoul of the Establishment Clause. Rather, the question at the heart of the endorsement test, is whether an objective observer would perceive that Borden, and by extension the School District and therefore the state, is advancing or promoting religious practice. Here, if Coach Borden silently bows his head and takes a knee as he requests, even without knowledge of Borden's 23-year history of involvement with pre-game prayer, any such observer who peered into East Brunswick's locker room

before a game would probably observe something very much like the following[27]

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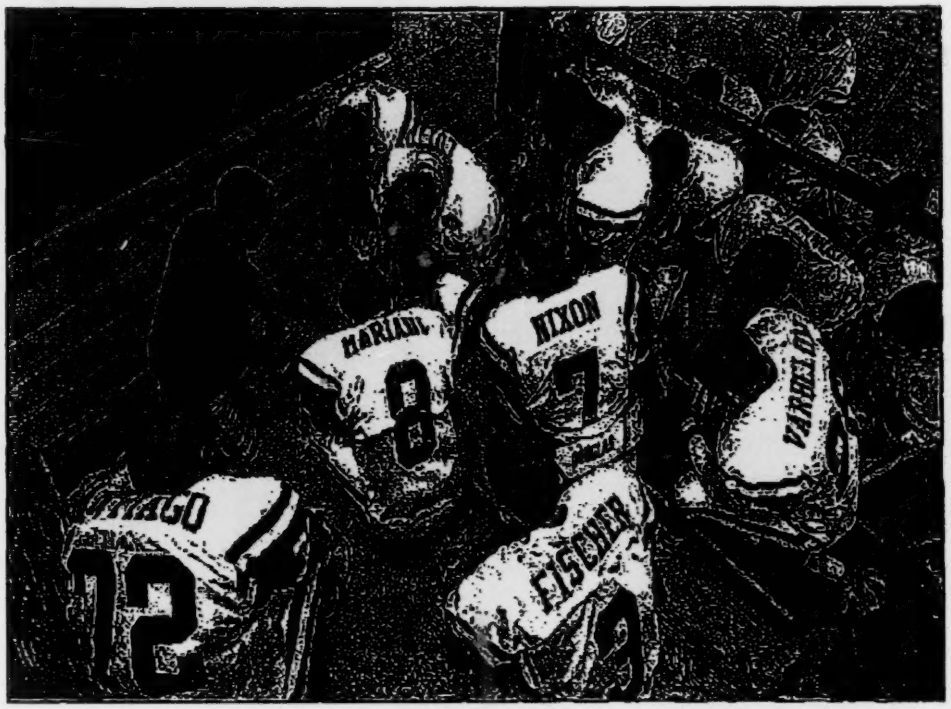
[27] In fairness, it is important to note that when asked at oral argument, counsel for Coach Borden was not able to confirm that this picture, submitted in the School District's Reply Brief, accurately depicts the pregame prayers after the district court's grant of summary judgment. The photograph was not entered into evidence in the district court. However, it is not disputed that the coach in the picture is Coach Borden, and counsel for Borden did not claim that the picture is inaccurate. Regardless of when it was taken, it certainly appears to be what an objective observer would see if he/she were to observe the coach "silently bowing his head and taking a knee." Compl. ¶ 18. In his brief to this court, Borden states that after the district court invalidated the School District's policy, he "silently bowed his head and took a knee with his players while his players prayed before every game during the 2006 season." Borden's Br. at 3. (This photograph was downloaded from the Boston Globe web site, and is available at http://www.boston.com/sports/schools/gallery/11_0706_grossfeld_prayer/) (last viewed March 12, 2008).



It would be neither surprising nor unreasonable if that observer were to conclude that the coach is praying with his team - perhaps even that he is leading the team in prayer. Such a conclusion would certainly be buttressed by knowledge of Coach Borden's history of involvement in team prayer, but the absence of that history would not necessarily yield a different result.

II.

Another troubling consideration (which I amplify below) is that a non-religious student or one who adheres to a minority religion might feel subtle (albeit unintentional) coercion to participate in the ritual despite disagreement or discomfort with it.

That raises a serious Establishment Clause issue under the Supreme Court's "coercion" test.[28]

The district court accepted the argument that the prayer that occurred after October 7, 2005, was "student-initiated." (JA 37). It clearly was not. I have no doubt that Coach Borden is a sincere and remarkably dedicated individual who cares deeply for his players. He is also a very successful coach. Unfortunately, in an apparent desire to do what he thought was best for his players, he lost sight of his role as a teacher in a public school.

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[28] "The Supreme Court has applied the "coercion" test as well as the "endorsement" test in determining whether state action violates the Establishment Clause in the public school context. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (applying endorsement test and coercion test); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (observing that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools" because "prayer exercises in public schools carry a particular risk of indirect coercion"); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985) ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.").

After initiating this litigation, and prior to the start of the 2006 season, Coach Borden directed the captains to poll the football team and ask each player whether or not he wanted to "follow the same practices as last year" regarding prayer at the pregame meals and in the locker room before the games. (JA 497). The captains then personally phoned every member of the football team. Not surprisingly, given the non-anonymous nature of the poll, no player objected. Given the uproar this issue visited on the community, the players must have known how important prayer was to their coach - and no high school athlete would want to disappoint the coach, or (as I shall explain) risk incurring the communal wrath that had been visited on the unfortunate cheerleaders the year before.[29]

I am not suggesting that Coach Borden intentionally pressured his players into voting for pregame prayer ceremonies or that he wanted to manipulate the outcome. Nevertheless, these players were put in the untenable position of either compromising any opposing beliefs they may have had

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[29] Moreover, the Supreme Court has held on more than one occasion that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943), quoted in *Santa Fe*, 530 U.S. at 304-5. "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Santa Fe*, 530 U.S. at 304- 05 (citation omitted).

or going on record (at the very least with their captains) as opposing their coach and perhaps a majority of their teammates.

Although the coach thought that the prayers would foster team unity, and even though the captains reported that all players wanted to continue the tradition, the record suggests that the reality was quite different. In the fall of 2005, Superintendent Magistro received a phone call from a "crying and overwrought" woman who identified herself as the mother of an East Brunswick football player. (JA 153-59, 451). The mother complained that her son "was extremely upset at Mr. Borden's fostering and participating in prayer amongst the football players." (*Id.* at 451). When Magistro asked why her son participated in the team prayers despite his discomfort, the mother responded that he "was fearful that if he did not go along with what was obviously the coach's desire, he would not get playing time." (*Id.*). The call was one of the factors that led to the School District policy Borden challenges.

Unfortunately, the coach appears not to have considered the possibility that the tradition he wanted to foster could be troubling for some players and possibly deter others from playing football at all. The Supreme Court addressed an analogous situation in Lee. There, the Court held that a public school could not force nonbelievers to choose between participating in prayer or missing their graduation ceremony.

> Attendance [at graduation] may not be required by official decree, yet it is apparent

> that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which would have motivated the student through youth and all her high school years.

Lee, 505 U.S. at 595. Participation in high school athletics is no less important than attending one's high school graduation. Indeed, the ongoing involvement with high school athletics is undoubtedly far more important to some than a one-time graduation ceremony. High school sports have long been a central part of our communities and they shape the character of many teenagers far more than a single graduation ceremony.

Regrettably, Coach Borden as a teacher (and therefore as a state actor for purposes of the First and Fourteenth Amendments) failed to appreciate that others may not agree with his beliefs or that the religious beliefs that he held dear might be in tension with contrary (but equally valid) beliefs of some of his players. Any player who held opposing beliefs should not have had to "go along to get along" by silently participating in religious observances he disagreed with.

> For, "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." . . . "[W]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school

> context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." . . . The constitutional command will not permit the District "to exact religious conformity from a student as the price" of joining [his] classmates at a varsity football game.

Santa Fe, 530 U.S. at 312 (quoting *Lee*, 505 U.S. at 592, 594).

Indeed, "it is quite possible that parents of some [students] chose public education precisely so that their children would not be compelled to follow the religious beliefs of others." *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1482 (3d Cir. 1996)(en banc). That likelihood is particularly strong here given the telephone call of at least one "overwrought" parent that Superintendent Magistro received in reaction to pregame prayers before the School District enacted the policy that is challenged here.

This does not, of course, mean that students have no right to pray; they clearly do. Whatever else it may be, prayer is a form of speech and deserves no less protection than secular speech. *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962).[30] The policy the School District developed in response to the

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[30] Such prayer does not, however, have to occur in the locker room.

complaints about pregame prayers was an effort to protect the First Amendment liberties of everyone in the school community.

The Supreme Court has observed that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Yet, the Court also reminds us that "[i]t is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of [religion] . . . and leave . . . purely religious function[s] to the people themselves and to those the people choose to look to for religious guidance." *Engel*, 370 U.S. at 435.

Coach Borden's dedication to instilling in his players values such as respect and team unity is certainly praiseworthy. However, as we have explained, the laudable intentions of state actors do not control an analysis under the First Amendment. "For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance." *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 382 (1985). This record contains powerful evidence of such division.

Superintendent Magistro testified that she received telephone calls in September 2005 from some parents of cheerleaders. They complained that their daughters were "uncomfortable" when Borden initiated a prayer at a pregame dinner. (JA 153-56). Students apparently learned of these complaints,

and blamed two Jewish cheerleaders. Thereafter, those cheerleaders were publicly ridiculed by other students at athletic events, and the cheerleading squad was taunted, bullied, and booed. (JA 452 at 5). The cheerleaders were even harassed and threatened on a student internet "blog." In the days following Coach Borden's resignation, several internet posts appeared under the heading, "Jewish Cheerleaders who suck!!!." The following are a few examples of the disgusting comments that were posted:

- "First they crucify Jesus, then they got Borden fired . . . . Jews gotta learn to stop ruining everything cool." (JA 460)

- "The jew is wrong. Borden is right. Let us pray." (JA 467)

- "d**n jews . . . then you wonder why hitler did what he did back in the day." (JA 471)

- "MAYBE if [Borden] held a gun to the jjjjewwws head and was like b*tch get on ur knees and pray to jesus!! then that might be breaking the law...ehhh maybe not! . . . just suck it up if u don't fu*king like whats going on in america then GO THE FU*K BACK TO YOUR COUNTRY AND STAY THERE AND PRAY . . . ." (JA 487-88)

- "Heil Hitla!!! sieg heill." (JA 490)[31]

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[31] Borden's counsel, in his brief and at oral argument, urged us to disregard evidence of parents' calls to the Superintendent and harassment of the cheerleaders:

> [E]very assertion cited to by [the School District] to support every alleged parent or student complaint about Borden's pre-October 7, 2005[,] activity is based on hearsay that is derived from anonymous sources that the [School] District refused to identify. Defendants have not submitted a single sworn, or even unsworn, statement from any alleged complaining student or parent. Nor has the [School] District disclosed the name of any alleged complaining student or parent.

Borden's Br. at 16-17. However, given the nature of these venomous comments, counsel can not seriously suggest that the evidence be ignored merely because students and parents who opposed Coach Borden's policy were not willing to identify themselves and offer direct testimony. The situation is neither new nor unique. In *Santa Fe Independent School District v. Doe*, the Court noted that the district court permitted students and parents to litigate anonymously. 530 U.S. at 294. The opprobrium that can await those who publicly state their opposition to prayer

(continued...)

These exchanges illustrate the continuing relevance of Justice O'Connor's admonition that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The School District attempted to address these concerns by adopting the policy that the district court struck down in the face of Coach Borden's challenge.

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in school is evident from the Court's opinion in *Santa Fe*:

> About a month after the complaint was filed, the District Court entered an order that provided in part: "[A]ny further attempt on the part of District or school administration, . . . teachers, employees or servants of the School District, parents, students or anyone else, . . . to ferret out the identities of the Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping', will cease immediately.

Id. at 294 n.1 (alteration in original). The district court had to threaten contempt sanctions and criminal liability to protect the parents and students who objected to the practice of prayer at football games. *Id.*

In reversing the district court, we help to ensure the continued vitality of the Establishment Clause as well as the rights of all to worship as they please.

BARRY, Circuit Judge, concurring.

There was no question, and the parties clearly understood, that there was one predominant issue before the District Court: whether the actions in which Borden wished to engage would violate the Establishment Clause of the First Amendment, not whether the conduct in which he had engaged would pass constitutional muster. Put in specific terms, the parties and the District Court focused their attention on how this public high school football coach could react, consistent with the Establishment Clause, when members of his team decide to initiate voluntary prayers at a pre-game meal attended only by players, staff, players' parents, and invited guests, and in the locker room before a game where only players and coaches are present.

Borden, for his part, represented that, whatever had gone before, he would no longer pray with the team, move his lips, join his hands with the players, or even close his eyes. Rather, the two silent actions in which he wished to engage — bowing his head and taking a knee when the team decides to pray — are to show his "personal respect" for his players and "respect for what this game entails and what they do to go out there and play and give it their all." The defendants had no problem with that. As Superintendent Magistro put it, "if the courts determine that [Borden] taking a knee, bowing his head, is appropriate, that's fine. He can do that. I

think that's what this is all about." Again, "[i]f the courts come down and say Borden can bow his head, bend his knee, jump on the table, I am going to allow it." The defendants' briefs before the District Court on the cross-motions for summary judgment continued that theme. One put it this way: "If this Court were to find plaintiff s actions do not implicate the Establishment Clause, then regardless of what Constitutional right plaintiff seeks relief under . . . he would be entitled to participate in voluntary, non-disruptive student prayers."

Suffice it to say that when they were before the District Court, the parties were in good faith trying to avoid an Establishment Clause problem, with defendants explicitly agreeing to abide by the District Court's decision. But defendants did not do so. Rather, now armed with new counsel, they filed an appeal, creating before us a legal landscape that bears little or no resemblance to what went on before the District Court and surely causing the temperature of this litigation to soar.

Given my druthers, I would hold defendants to their word and would not entertain, as my distinguished colleagues have so generously entertained, the new issues and arguments raised on this appeal.[32] I will not, however, tarry to push the

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[32] I would find, for example, that defendants have waived the argument that numerous pedagogical reasons justified the directives and not just fear of litigation and the argument that Borden has no

(continued...)

proverbial waiver rock uphill as to all of those issues and arguments because I cannot disagree, nor does Judge McKee, with the bottom-line conclusions of Judge Fisher's superb lead opinion that "the guidelines and the Board's statement were not unconstitutional on their face, were not unconstitutional as applied to Borden, and in fact, were necessary for the School District in order to avoid Establishment Clause violations." These conclusions are "threshold question[s] necessary to a proper analysis of the parties' [Establishment Clause] arguments," before us and so, even if not adequately raised before the District Court, it is appropriate that we consider them. See *Tenafly Eruv Ass'n Inc. v. Borough of Tenafly*, 309 F.3d 144, 158 n.15 (3d Cir. 2002).

I write separately, however, to express my view that whether or not Borden's past prayer activities with the team signaled an unconstitutional endorsement of religion — and I have little doubt that they did — a reasonable observer would not conclude that the "respectful display" he proposes would violate the Establishment Clause. The lead opinion concludes, in its additional, albeit unnecessary, "hold[ing]," that that display would "cross the line." It does so, however, as does Judge McKee's concurring opinion, by having the reasonable observer look only at Borden's twenty-three years of history with the team's prayers and the context of the display

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constitutional rights which would limit defendants' exercise of their discretion.

he proposes.[33] Yet a reasonable observer would not only have knowledge of that history, but would know of all that has taken place leading up to and during this litigation and know that Borden, under oath, has represented what he will and will not do and that he merely wishes to show respect for his players when they pray. A reasonable observer would have no reason to believe that Borden was lying.

Moreover, given the limited number of attendees at the pre-game meal, it is fair to say that a reasonable observer of a prayer before that event would be a player, coach, parent, or invited guest, and a reasonable observer when the team takes a knee for a pre-game prayer in the locker room would be a player or a coach, just as in *Santa Fe* the observer was "an objective Santa Fe High School student." *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). Thus, if and when in the future a player decides to initiate prayer, the reasonable observer would know, given Borden's representations, that he did not ask for a prayer; did not select someone to say

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[33] Judge McKee has included in his concurring opinion a picture of unknown date that is not in evidence in this case and thus, in my view, not appropriately considered by us. Having lost that battle, I agree with Judge Fisher's assessment of the picture and what more would be needed before a reasonable observer could reach the conclusion that Borden was, in fact, praying, a conclusion reached by Judge McKee based on the picture alone. *See* Lead Op. at n.25.

a prayer; did not monitor the content of the prayer; did not provide a means for broadcasting the prayer; did not join his hands with anyone; and did not mouth the words of the prayer, or say it aloud, or otherwise do anything to put the imprint of the state on the prayer. A reasonable observer would simply see Borden bow his head or take a knee in a silent, unobtrusive sign of respect for the private choices made by individual players who are constitutionally permitted to choose to engage in religious activities. See, *e.g.*, *Zelman v. Simmons Harris*, 536 U.S. 639, 649-55 (2002); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 251-52 (1990); *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 531 (3d Cir. 2004).

My colleagues and I do not disagree that bowing one's head and taking a knee can be signs of respect; indeed, Judge Fisher "would likely" find, as would I, *no* endorsement of religion were a football coach, who had never engaged in prayer with his team, to bow his head or take a knee while his team engaged in a moment of reflection or prayer. Apparently, it is only Borden, given his prior history, who cannot constitutionally respond to constitutionally protected student-initiated and student-composed prayer but, if he can, we are not told what response might be permissible. Surely he would not be required to keep his head erect or turn his back or stand and walk

away.[34] Any such requirement would evidence a hostility to religion that no one would intend.

This is a difficult and close case, complicated by the fact that; unlike the vast majority of Establishment Clause cases which are brought by plaintiffs complaining of a state's actions, this case was brought by an employee of a state complaining about pre-emptive action taken by the state in its attempt to avoid an Establishment Clause problem. With this litigation hopefully nearing its end, one also hopes that those involved will move forward as a team for the benefit of the young people who look to them for guidance and support.

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[34] One wonders how a court can dictate, beyond a certain point, what response is permissible, much less how a response would be enforced. Defendants told the District Court that Borden can bow his head, but he cannot do "a pronounced bowing of the head." What is "pronounced," and who would decide that question? As defendants also told the District Court, "The district does not have thought police, and we certainly don't have bow police."

APPENDIX B

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Attorney for Plaintiff, Marcus A. Borden

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARCUS A. BORDEN,

Plaintiff,
vs.

EAST BRUNSWICK SCHOOL DISTRICT, EAST BRUNSWICK SCHOOL BOARD AND DR. JO ANN MAGISTRO, in her capacity as Superintendent of East Brunswick Public Schools,

Defendants.

Civ. A. No. 05-5923 (DMC)

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

DOCUMENT ELECTRONICALLY FILED

THIS MATTER having been opened to the Court by way of a motion for summary judgment filed on behalf of Defendants by Scarinci & Hollenbeck, L.L.C. (Martin R. Pachman, Esq. appearing) and a cross-motion for summary judgment filed on behalf of Plaintiff by Ronald

J. Riccio, Esq., and the Court having considered all documents submitted in support of and in opposition to the respective motion and cross-motion, and good cause having been shown;

IT IS on this 25 day of July, 2006;

ORDERED, ADJUDGED and DECLARED that:

1. Defendants' motion for summary judgment be and the same is hereby denied in accordance with the Opinion of this Court, on the Record, 2006; July 25;

2. Plaintiff's cross-motion for summary judgment be and the same is hereby granted in accordance with the Opinion of this Court, on the Record, 2006; July 26;

3. As the prevailing party, Plaintiff is awarded costs and counsel fees as against Defendants. Counsel for Plaintiff shall submit an appropriate application setting forth the amount of costs and counsel fees to be awarded within 20 days of the date of this Order.

_____

Hon. Dennis M. Cavanaugh, U.S.D.J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARCUS A. BORDEN Plaintiff, v. EAST BRUNSWICK SCHOOL DISTRICT, EAST BRUNSWICK SCHOOL BOARD, AND DR. JO ANN MAGISTRO, in her capacity as Superintendent of East Brunswick Public Schools, Defendants.	:	Civil No. 05-5923 (DMC) TRANSCRIPT OF PROCEEDINGS

Newark, New Jersey
July 25, 2006

BEFORE:

THE HON. DENNIS M. CAVANAUGH, U.S.D.J.

Reported by
CHARLES P. MCGUIRE, C.S.R.
Official Court Reporter

* * *

THE COURT: Well, this case has taken a lot of time and a lot of effort; and, hopefully, we'll resolve it.

As stated, it's the Plaintiff's view that his First and Fourteenth Amendment rights to free speech, privacy, persona autonomy, freedom of association, and academic freedom have been and continue to be violated as a result of the Directives set forth by the Superintendent and the Board, as well as the New Jersey constitutional rights of liberty and free speech.

According to the Plaintiff, the activity he wishes to engage in and is now prohibited from engaging in include the silent bowing of his head and/or taking a knee. He wishes to engage in these acts during the 2006 East Brunswick High School football season while his players say player-led, player-initiated and player-composed, voluntary, non-denominational pregame prayers. As such, the Plaintiff by his complaint seeks the following declaratory and injunctive relief:

First, a declaratory judgment declaring that the guidelines and the Board's October 20, 2005 public statement are unconstitutional, in violation of the New Jersey State Constitution, first count, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, second count, and are therefore null and void;

Secondly, that preliminary and permanent injunctive relief enjoining the Defendants, their officers,

agents, servants, employees, attorneys, affiliates and those persons in active concert of participation with them from actively enforcing the guidelines or Directives, the Board's October 20th public statement, or taking any action by way of complaint or otherwise against Coach Borden by virtue of his acts of demonstrating respect for the team prayers by silently bowing his head and taking a knee during these prayers or activities;

And, third, vacating the guidelines from Superintendent Magistro and the Board's October 20 public statement insofar as both, individually or collectively, threaten action against Coach Borden for demonstrating respect for the team's prayers by silently bowing his head and taking a knee.

Plaintiff submits by way of his Complaint that for more than 25 years, the East Brunswick public high school football team has engaged in two voluntary pregame prayers (collectively, "The Team Prayers"). The first is to say grace before every pregame team meal, and the second voluntary team prayer in the locker room while "taking a knee" as a team unit prior to the start of the game.

Defendants contend that if they were to allow the Plaintiff to "participate" in prayer with the student members of the football team, his actions and therefore the school district's actions would be in violation of the Establishment Clause. They argue that Supreme Court precedent dictates that the Court apply the Endorsement Test, the Coercion Test and the *Lemon* Test, and that regardless of which test is applied, Plaintiff's proposed participation in student

prayer is impermissible under the Establishment Clause.

Plaintiff, on the other hand, argues that he wishes to partake in certain symbolic conduct, i.e., bowing his head and "taking a knee," as a sign of respect and deference to his players, who wish to engage in prayer. He claims that he does not intend to pray with his players, nor to lead them in prayer; that his players have voluntarily decided what they want to say. Furthermore, he submits that his symbolic conduct is part of being a football coach and is premised upon purely secular values and beliefs. Plaintiff's main argument is that the October 2005 directive violates his constitutional right to free speech because he wishes to engage in nonverbal conduct of symbolic expression of a secular nature, which is protected under the First Amendment. He also claims that Defendants are mistaken in their interpretation of the Establishment Clause, and that Plaintiff's conduct does not, in fact, violate the Establishment Clause.

The Establishment Clause of the First Amendment forbids the enactment of any law or practice "respecting an establishment of religion." The case law developed under the Establishment Clause has grown very complex, and there seems to exist a case for and against each proposition furthered by any party. What is certain, however, is that the Supreme Court has set forth three tests for determining whether the Government has violated the Establishment Clause. The most well-known of these tests is the *Lemon* Test, which states that a government practice is constitutional if, one, it has a secular purpose, two, its primary effect neither

advances nor inhibits religion, and, three, it does not excessively entangle government with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Second is the Coercion Test, applied by the Supreme Court in *Lee v. Weisman*, 505 U.S. 577 (1992), where the Court considered school-sponsored religious activity in terms of the coercive effect that the activity has on students. Finally, the Supreme Court has applied what is known as the Endorsement Test, which asks whether a fully informed hypothetical observer would view a government practice as either endorsing or disapproving of religion. *See County of Allegheny v. ACLU*, 492 U.S. 574, 594 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 687-694 (1984).

It is well established that the practice of having a prayer recited daily in a classroom, even if non-denominational, is unconstitutional. *Engel v. Vitale*, 360 U.S. 421 (1962); *Lee v. Weisman*, 505 U.S. 577 (1992). Other courts have also held that all school-sponsored prayer and religious exercises are unconstitutional. *See School District of Abington Township v. Schempp*, 374 U.S. 202 (1963). Although participation in both the *Engel* and *Schempp* cases was 'voluntary,' the Supreme Court found that this fact was without constitutional significance. Courts in other Circuits have analyzed pregame prayer and found unconstitutional an "equal access" plan under which student volunteers could recite prayers of their own choosing as part of a pregame ceremony. *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir. 1989); *Accord, Doe v. Aldine I.S.D.*, 563 F. Supp. 883 (S.D. Texas 1982).

Typically in a case of this sort, a student or parent has challenged the conduct, and the school district finds itself in the position of defending itself and its practices. Here, however, we are faced with a situation where the school district has taken pre-emptive action so as to avoid what they view to be a possible Establishment Clause problem. At first, due to the fact that the Supreme Court repeatedly applies the *Lemon* test when a question of Establishment Clause jurisprudence arises, I thought that it was important for the Court to consider the Plaintiff's proposed actions under the *Lemon* formula. However, the problem I have with that is that we are not here faced with the question of whether Mr. Borden and his team should be allowed to engage in prayer. Rather, Mr. Borden is merely' asking the school district to allow him to remain present while the team says grace at the pregame meal and to take a knee and bow his head with his team before the game. As such, I agree with the Plaintiff's argument that the Establishment Clause test most applicable to the situation at hand is the Endorsement Test, which asks whether a fully informed, hypothetical observer would view a government practice as either endorsing or disapproving of religion as that is often applied by the 3rd Circuit. *See Freethought Society v. Chester County*, 334 F.3d 247 (3rd Cir. 2003).

The Endorsement Test requires a court to ask whether a reasonable/objective observer of Borden's conduct would consider his "head bowing" or "taking a knee" to be an example of the government endorsing or disapproving religion.

First, I think that the bowing of one's head to a reasonable observer does not indicate endorsement of religion. People bow their heads frequently as a sign of respect - for example, government and world leaders call for moments of silence as a sign of respect, a practice wherein people inevitably bow their heads.

I understand Plaintiff's argument that he wishes to take a knee as a sign of respect to his team, who are taking a knee of their own accord, and I think that this possibly could be looked at with some religious overtones. However, I have read Plaintiff's submissions, and perhaps in the history of football, taking a knee does not have the significance typically associated. Borden distinguishes taking a knee from the act of kneeling so as to say a prayer - he claims that taking a knee is "not praying, nor can it be compared in any way to kneeling to pray." (Borden Dec. Paragraph 15). Rather, Borden posits that "it is a time-honored football tradition. It is a demonstrative way of showing team solidarity, team cohesion, and team seriousness of purpose." (*Id.*) In that vein, the pregame traditions of the East Brunswick High School football team should be thought of more as invocations, which have been held permissible and of secular purpose, rather than as prayer. *See Marsa v. Wernik*, 86 New Jersey 232, 248 (invocations at borough council meetings serve as a "call to conscience" and create "an atmosphere conducive to open exchanges, cooperative participation, and tolerant and conscientious deliberations of all those present . . .").

It is important to keep in mind that Coach Borden is not asking the Court to allow him to lead his team in prayer but rather to bow his head and take a knee as part of a pregame secular football tradition. We cannot just look at this case in a vacuum. Tradition plays a part, and the overall actions and responsibilities of a football coach should be considered. Plaintiff argues, and I agree, that there is a place for team spirit, team unity, and team family, if you will. For the coach, who is looked at as the glue to hold all of this together and foster team spirit, to not be allowed to participate in these traditions even in the passive way just doesn't seem right. In fact, to not be able to acknowledge these pregame traditions in even a passive participation would or could be looked at as disrespectful to and undermining the sense of the team mentioned above.

With respect to the coercion of players and the fear that a coach that participates may have an adverse effect on those players who choose not to pray or otherwise take part in pregame traditions, whether the coach passively participates by taking a knee, silently bowing his head as the students pray or otherwise conduct themselves really would make little or no difference in my view, since if it was a coach's intention to retaliate against a student who does not wish to participate, the coach could find this out anyway. Accordingly, the coach's passive participation in otherwise student-initiated and -led prayers and traditions are of no moment.

Thus we come down to what is considered participation. What is the coach to do? Should he leave the room? Turn his back? Stand at attention

and not move a muscle? I don't think so. May he clasp his hands? At what angle or degree is his head to be considered bowed? May he crouch down, bend a knee, take a knee, or completely kneel?

I don't think it's fair to ask a coach to do nothing. I agree that an Establishment Clause violation would occur if the coach initiated and led the activity, but I find nothing wrong with remaining silent and bowing one's head and taking a knee as a sign of respect for his players' actions and traditions, nor do I believe would a reasonable observer.

I believe to preclude the Plaintiff from such an action would be a violation of his rights. I believe the Directives as stated are overbroad and vague. To threaten the Plaintiff with insubordination if he is to participate places him in an untenable position.

I find that the Plaintiff's request to bow his head in silence and take a knee do not violate the Establishment Clause of the Constitution.

I find, further, that the Defendants' directive regarding the Plaintiff's nonparticipation is over broad and vague, and violates the Plaintiff's First and Fourteenth Amendment rights to free speech, freedom of association, academic freedom, as well as New Jersey's constitutional rights to liberty and free speech.

Accordingly, since there are no issues of material fact left in dispute, as a matter of law, I deny the defendants' motion and grant the Plaintiff's motion for summary judgment.

An appropriate order will follow.

Thank you.

(Matter concluded)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-3890

MARCUS A. BORDEN

v.

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK; BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK; Dr. JO ANN MAGISTRO, in her capacity as Superintendent, School District of the Township of East Brunswick,

Appellants

On Appeal from the United States District Court for the District of New Jersey (D.C. No. 05-cv-05923)
District Judge: Honorable Dennis M. Cavanaugh

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN, *Circuit Judges*.

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellee having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision

not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en bane, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ D. Michael Fisher,

Circuit Judge

Dated: May 15,2008

PDB/cc: All Counsel of Record